DOCKET

No. 07-901
Title: Oregon, Petitioner
v.
Thomas Eugene Ice
Docketed: January 8, 2008
Lower Ct: Supreme Court of Oregon
Case Nos.: (S52248)
Decision Date: October 11, 2007

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jan 4 2008	Petition for a writ of certiorari filed. (Response due February 7, 2008)
Feb 5 2008	Brief of respondent Thomas Eugene Ice in opposition filed.
Feb 5 2008	Motion for leave to proceed in forma pauperis filed by respondent Thomas Eugene Ice.
Feb 15 2008	Reply of petitioner Oregon filed. (Distributed)
Feb 20 2008	DISTRIBUTED for Conference of March 14, 2008.
Mar 17 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Mar 17 2008	Petition GRANTED limited to the following question: Whether the Sixth Amendment, as construed in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.
Apr 3 2008	Motion to appoint counsel filed by respondent Thomas Eugene Ice.
Apr 15 2008	Motion DISTRIBUTED for Conference of May 8, 2008.
Apr 21 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 2, 2008.
May 12 2008	Motion to appoint counsel filed by respondent GRANTED. Ernest G. Lannet, Esquire, of Salem, Oregon, is appointed to serve as counsel for respondent in this case.
Jun 2 2008	Joint appendix filed. (Statement of costs received)
Jun 2 2008	Brief of petitioner Oregon filed.
Jun 9 2008	Brief amici curiae of Indiana, et al. filed.
Jun 9 2008	Brief amici curiae of Sentencing Law Scholars filed.
Jun 9 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Jun 9 2008	SET FOR ARGUMENT ON Tuesday, October 14, 2008.
Jun 10 2008	Consent to the filing of amicus briefs, in suport of either party or neither party, received from counsel for the petitioner.
Jun 20 2008	The time to file respondent's brief on the merits is extended to and

	including August 1, 2008.
Jul 3 2008	CIRCULATED
Aug 1 2008	Brief of respondent Thomas Eugene Ice filed. (Distributed)
Aug 8 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Aug 18 2008	Record received from the Supreme Court of Oregon. (1 box)
Aug 29 2008	Reply of petitioner Oregon filed. (Distributed)
Oct 14 2008	Argued. For petitioner: Mary H. Williams, Solicitor General, Salem, Ore. For respondent: Ernest G. Lannet, Senior Deputy Public Defender, Salem, Ore. (Appointed by this Court.)

PETITION FOR WRIT OF CERTIORARI

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No. _____

81

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petition for Writ of Certiorari to the Oregon Supreme Court

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), is violated by the imposition of consecutive sentences based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, State of Oregon, respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court filed on October 11, 2007, and to resolve the significant split among state courts concerning the application of *Apprendi* and *Blakely* to factual findings required for imposition of consecutive sentences.

OPINIONS BELOW

The Oregon Court of Appeals affirmed respondent's conviction and sentence without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

The Oregon Supreme Court reversed in a 5-2 decision. *State v. Ice*, 343 Or. 248, ___ P.3d ___ (2007). That decision is reprinted in the Appendix at App. 1 to App. 46.

JURISDICTION

The Oregon Supreme Court filed its decision on October 11, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the state court's decision on a writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATE STATUTORY PROVISION INVOLVED

Or. Rev. Stat. § 137.123[1] provides for consecutive sentencing as follows:

> (1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the

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[1] With the exception of some legally insignificant changes made in 2003 to correct a typographical error and to alter punctuation, Oregon Laws 2003, ch. 14, § 58, the version set out above is the version that applied to respondent.

same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.

(2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.

(3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.

(4) When a defendant has been found guilty of more than one crimi-

nal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a dif-

ferent victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

STATEMENT

After a jury trial, respondent was convicted of two counts of first-degree burglary and four counts of first-degree sexual abuse. The court sentenced him to a total of 340 months, with three of the sentences running consecutively. The Oregon Court of Appeals affirmed the judgment, without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001). The Oregon Supreme Court reversed and remanded for resentencing, holding that the sentencing court—by imposing consecutive sentences based on its own findings and not based on jury findings—violated respondent's rights under the Sixth Amendment, as construed by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). *State v. Ice*, 343 Or. 248, ___ P.3d ___ (2007).

1. The underlying facts and convictions

Respondent managed an apartment complex where the 11-year-old victim lived with her mother and her younger brother. App. 2. Respondent twice entered the family's apartment, entered the victim's bedroom, and touched her

breasts and then her vagina. *Id.* Respondent faced six charges. For each of the two incidents, the state charged respondent with first-degree burglary for entering the victim's apartment with the intent to commit sexual abuse, first-degree sexual abuse for touching the victim's breasts, and first-degree sexual abuse for touching the victim's vagina. App. 3. The jury convicted respondent of all six charges. *Id.*

2. The sentencing proceeding

Before sentencing, the parties submitted sentencing memoranda. The state sought consecutive sentences. App. 3-4. The state argued that the sentencing court should run the sentences for the two burglaries consecutively based on a finding that there were two separate criminal episodes. *See* Or. Rev. Stat. § 137.123(2). The state also argued that, within each of those two criminal episodes, the sentence for sexual abuse based on touching the victim's vagina should run consecutively to the sentence for burglary. *See* Or. Rev. Stat. § 137.123(4) and (5). The state recommended that the sentences for sexual abuse based on touching the victim's breasts should run concurrently with the sentences for sexual abuse based on touching the victim's vagina. App. 3-4. Respondent initially presented only a state constitutional argument concerning the necessity for a jury finding instead of a judicial finding on the

issue of the merger of the sexual abuse convictions within each episode. App. 4-5.

Between the time respondent presented his sentencing memorandum and the sentencing proceeding, this Court decided *Apprendi*. Respondent filed a supplemental memorandum bringing *Apprendi* to the sentencing court's attention and asserting broadly, "'[I]t is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute.'" App. 5.

At the sentencing hearing, the sentencing court rejected respondent's arguments and followed the state's sentencing recommendations. App. 5-6. Or. Rev. Stat. § 137.123 directs that multiple sentences be served concurrently unless the judge finds (1) that the offenses did not occur as part of the same course of conduct or (2) that, even if the offenses occurred as part of the same course of conduct, one offense was not incidental to the other or the two offenses resulted in separate harms. The sentencing court "found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of 'separate incident[s]' and, thus, did not 'arise from the same continuous and uninterrupted course of conduct.'" App. 12. (quoting Or. Rev. Stat. § 137.123(2)). That finding permitted the sentencing court "to order that the sentences arising out

of the second burglary run consecutively to the sentences arising out of the first burglary." *Id.*

The sentencing court also implicitly found "that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a 'continuous and uninterrupted course of conduct.'" App. 12 (quoting Or. Rev. Stat. § 137.123(4); footnote omitted). In order to impose consecutive sentences on the burglary and sexual abuse convictions, the sentencing court found that the convictions for burglary and sexual abuse reflected a "'willingness to commit more than one criminal offense'" and, alternatively, that the two offenses "'caused * * * greater or qualitatively different loss, injury or harm to the victim.'" App. 13 (quoting Or. Rev. Stat. § 137.123(5)(a) and (b)). Based on these factual findings, the sentencing court imposed consecutive sentences on the two burglary convictions, consecutive sentences on each conviction for sexual abuse based on touching the victim's vagina, and concurrent sentences for the remaining two sexual abuse convictions based on touching the victim's breasts. App. 7-8.

3. The Oregon Court of Appeals affirmed without opinion.

Respondent appealed and the Oregon Court of Appeals affirmed without a written opinion.[2] *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

4. The Oregon Supreme Court reversed, holding that the imposition of consecutive sentences violated respondent's Sixth Amendment rights.

Respondent petitioned for review in the Oregon Supreme Court. In a 5-2 decision, that court reversed and remanded for resentencing. On the consecutive-sentencing issue, the majority first addressed respondent's arguments under the state constitution. The court conducted a thorough review of its precedent and reaffirmed that the state constitutional jury-trial right applies only to "elements" of the crime. App. 13-21. Regardless of legislative labels, all "facts which con-

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[2] The significant delay between the Oregon Court of Appeals opinion in 2001 and the Oregon Supreme Court opinion in 2007 was caused by the large number of cases in the state appellate courts presenting various issues related to *Apprendi* and *Blakely*. As lead cases were identified with issues to be resolved by those courts, other cases raising similar issues were held in abeyance.

stitute the crime"—that is, facts that pertain to the act to be punished—are "elements" for state constitutional jury-trial purposes and must be proved to the jury. *Id.* Other types of facts that lead to enhanced punishment, including "those that 'characterize the defendant,'" may be reserved for the sentencing judge. *Id.* Applying those principles to the question at hand, the Oregon Supreme Court held that consecutive-sentencing findings could not be deemed to be elements of the individual crimes. App. 21-23. Because those findings "involve a comparison between *two* crimes for which defendant is to be punished, none of the [findings] can reasonably be deemed to constitute an *element* of either crime." App. 22 (emphasis in original). Therefore, the sentencing court findings did not violate respondent's right to a jury trial under the Oregon Constitution. On this point, the majority and dissent agreed.

Turning to the federal constitution, however, the majority rejected the state's argument that the rule from *Apprendi* and *Blakely* is offense specific and is not intended to apply to the sequence in which discrete sentences for multiple crimes are to be served. In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

reasonable doubt." 530 U.S. at 490. In determining the scope of *Apprendi*, the Oregon Supreme Court focused on this Court's statement that "'the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict.'" App. 28 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added by Oregon Supreme Court). The Oregon Supreme Court concluded that that was the overarching principle to be gleaned from *Apprendi* and *Blakely*. The court then extended the application of those cases to *any* sentencing determination that results in a longer total sentence based on judicial factfinding, even aggregate sentencing determinations about how independent sentences are to be served. App. 28-30.

The Oregon Supreme Court held that the imposition of consecutive sentences based on judicial factfinding violates the Sixth Amendment as construed in *Apprendi* and *Blakely*. According to the majority, judicial factfinding as a prerequisite to a defendant serving multiple sentences consecutively "necessarily 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict,' *Apprendi*, 530 US at 494, based on judicial factfinding – and thereby violates the principles discussed in *Apprendi* and *Blakely*." App. 30 (footnote omitted).

The majority acknowledged that most other courts have construed *Apprendi* and *Blakely* as applying more narrowly to the sentence imposed on each separate conviction and not to sentencing in the aggregate. App. 30-31. But the majority disagreed with those decisions and, in doing so, clearly adopted a broad reading of this Court's precedent. "The *Apprendi*, *Blakely*, and [*United States v.*] *Booker*[, 543 U.S. 220 (2005),] decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage in an adamantine refusal to get the message." App. 31 (footnote omitted).

Where the majority discerned a broad underlying principle from this Court's cases, the dissent examined the specific problem this Court was addressing and concluded that this Court intended a more narrow focus. Writing for the dissent, Justice Kistler noted that in *Apprendi* and *Blakely*, "a trial court had enhanced a defendant's sentence for a single offense beyond the statutory maximum authorized for that offense based on a fact that the court had found during sentencing by a preponderance of the evidence." App. 35 (Kistler, J., dissenting). Justice Kistler determined that nothing in this Court's cases "answer[s] the separate question of how a trial court should aggregate multiple sentences when a jury has found a defendant guilty of multiple offenses." App. 37.

Justice Kistler stressed that this Court's broad references to punishment had to be read in context, while considering both the issues before the Court and the precise terms of this Court's holding. *Id.*

Justice Kistler identified the narrow issue before the *Apprendi* Court as the extent to which a legislature could avoid due-process requirements by redefining elements of crimes as sentencing factors that need not be determined by a jury beyond a reasonable doubt. App. 37-42. He traced this Court's response to that type of problem beginning with this Court's caselaw addressing affirmative defenses to crimes. App. 37-38 (discussing *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977)). From there, he traced this Court's consideration of the issue into the realm of sentencing factors. App. 39-40 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998)). Those decisions resulted in adoption of an open-ended multi-factor test to distinguish true "elements" from "sentencing factors." As Justice Kistler noted, this Court changed course in *Apprendi* and adopted a bright-line rule to avoid the problems inherent in that multi-factor test. App. 40-42 and n. 3.

Based on its understanding of the problem that this Court addressed in *Apprendi* and

Blakely, the dissent adopted a much narrower reading of that precedent. "Far from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature's efforts to redefine the elements of a single offense will stay within constitutional bounds." App. 41-42. That rule would apply only to individual sentences, not to aggregate sentencing determinations such as whether those sentences should be served consecutively. Thus, the dissent would have resolved the question in this case in favor of the state.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for writ of certiorari and review this case for two reasons. First, the Oregon Supreme Court opinion deepens the significant split among the state courts that have considered this recurring issue of federal constitutional law. Unlike many decisions in this area, the Oregon Supreme Court opinion is thoroughly analyzed and clearly presents the conflict over the scope of this Court's precedent that underlies the split among state courts. This Court should grant review to resolve this split and establish a uniform application of the federal constitutional jury-trial right for all states.

Second, the Oregon Supreme Court's holding is an unwarranted extension of *Apprendi* and *Blakely* beyond what this Court's reasoning supports. This Court has explained the *Apprendi* rule as a non-subjective means for determining the elements of an offense. By extending the jury-trial requirement to establishing how otherwise-lawful sentences are served, the Oregon Supreme Court has gone well beyond the due-process concerns that require states to prove each element of an offense to a jury beyond a reasonable doubt. The Oregon Supreme Court untethered the *Apprendi* rule—a rule grounded in the jury-trial guarantee—from the focus on an individual "offense" and, instead, linked it broadly to a defendant's total punishment. This Court should grant review to clarify the scope of the *Apprendi* rule and whether it applies to aggregate punishment.

I. State courts are deeply divided over the scope of *Apprendi* and *Blakely* and their application to consecutive sentencing.

The parting of ways between the majority and dissent in the Oregon Supreme Court opinion mirrors the split in other state courts that have addressed whether *Apprendi* and *Blakely* extend to findings that are necessary to impose consecutive sentences. The Oregon court's holding "deepens and confirms" the split on this recurring and significant issue of federal law. App. 44 (Kistler,

J., dissenting). There is at least a 7-3 split with state courts falling into two categories on whether *Apprendi* and *Blakely* apply to sentences in the aggregate.[3]

A. The majority of state courts in which a factual finding is required for imposition of a consecutive sentence have construed *Apprendi* and *Blakely* narrowly to not apply to aggregate sentencing determinations.

The majority of state courts that have addressed the issue have concluded that the principles of *Apprendi* and *Blakely* do not apply to findings required for imposition of consecutive sentences. Illinois, Maine, Indiana, Tennessee, Minnesota, Alaska and Colorado provide the clearest

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[3] For many other states, as well as the federal courts, the imposition of consecutive sentences does not require factfinding, so the question of the applicability of *Apprendi* and *Blakely* does not arise in the same manner. *See State v. Jacobs*, 644 N.W. 2d 695, 698-99 (Iowa 2001); *State v. Bramlett*, 273 Kan. 67, 41 P.3d 796, 797-98 (2002); *Gould v. State*, 2006 Wy 157, 151 P.3d 261, 267-68 (2006); *see also United States v. Booker*, 543 U.S. 220 (2005).

examples.[4] Each of those states, like Oregon, requires certain findings to impose consecutive sentences. Yet, each state's highest appellate court to have addressed the question concluded, unlike the Oregon Supreme Court, that this Court's cases were not intended to apply to aggregate sentences, but only to the individual sentence imposed for each separate conviction.

Illinois law, with some exceptions, requires concurrent sentences "unless, having regard to

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[4] In addition to the seven states discussed in this section, several other states have grappled with the application of *Apprendi* and *Blakely* to consecutive sentences. Hawaii, New Jersey, New York and Texas have rejected consecutive-sentencing challenges under *Apprendi* and *Blakely*, although the precise reasoning is more difficult to discern and may be influenced, especially in Texas, by peculiarities of state sentencing law. *State v. Kahapea*, 111 Haw. 267, 141 P.3d 440, 447 n. 8, 451-53, *recons. den.*, 111 Haw. 316, 141 P.3d 489 (2006); *State v. Abdullah*, 184 N.J. 497, 878 A.2d 746, 755-57 (2005); *People v. Lloyd*, 23 A.D.3d 296, 297-98, 805 N.W.S.2d 20, *appeal den.*, 6 N.Y.3d 755, 843 N.E.2d 1163, 810 N.Y.S. 2d 423 (2005); *Barrow v. State*, 207 S.W.3d 377, 378-80 (Tex. Crim. App. 2006); *Alameda v. State*, 235 S.W.3d 218, 223-24 (Tex. Crim. App.), *cert. den.*, 169 L. Ed. 2d 406 (2007).

the nature and circumstances of the offense and the history and character of the defendant, [the court] is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant[.]" 730 I.L.C.S. 515-8-4(b). Notwithstanding that that finding is required, the Illinois Supreme Court determined "that *Apprendi* concerns are not implicated by consecutive sentencing. It is a settled rule in this state that sentences which run consecutively to each other are not transmuted thereby into a single sentence. Because consecutive sentences remain discrete, a determination that sentences are to be served consecutively cannot run afoul of *Apprendi*, which only addresses sentences for individual crimes." *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, 441-42, *cert. den. sub nom. Wagener v. Illinois*, 534 U.S. 1011 (2001) (citations and footnote omitted). The court "recognize[d] that *Apprendi* contains isolated statements which on their face might appear to support the conclusion that the jury must find beyond a reasonable doubt each and every fact which might have any real-world impact on the length of time the defendant might spend in prison." 752 N.E.2d at 442. Nevertheless, the court determined that "these statements cannot be taken out of context" and declined "to extend the decisions of [this] Court to arenas which it did not purport to address, which indeed it specifi-

cally disavowed addressing[.]" *Id. See also People v. Carney*, 196 Ill. 2d 518, 752 N.E.2d 1137, 1147 (2001) ("*McMillan*, as well as *Apprendi*, spoke in terms of exposing a defendant to a greater punishment than that authorized for the particular offense. Consecutive sentences do not expose a defendant to punishment exceeding the statutory maximum for each conviction.").[5]

Similarly, Maine requires sentencing judges to make certain findings to impose consecutive sentences. *See* 17-A M.R.S.A. § 1256(2) (delineating findings) and *State v. Commeau*, 2004 Me. 78, 852 A.2d 70, 75 (2004) ("in the absence of the required findings, supported by the record, sentences must run concurrently"). The Maine Supreme Court recently denied a defendant's *Apprendi* challenge to the imposition of consecutive sentences. *State v. Keene*, 2007 Me 84, 927 A.2d 398, *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007). The court concluded that "the principles underlying *Apprendi* do not apply to

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[5] Although *Wagener* and *Carney* predate *Blakely*, an Illinois intermediate appellate court has subsequently held that *Blakely* does not change the analysis from the Illinois Supreme Court and has declined to require jury factfinding for consecutive sentences. *See People v. Tabb*, 374 Ill. App. 3d 680, 870 N.E.2d 914, 929, *appeal denied* 2007 Ill. LEXIS 1522 (2007).

consecutive sentences because a judge's decision on how two separate sentences for two distinct crimes shall be served is entirely different from the jury's determination of whether the elements of a crime, necessary for a particular sentence for that crime, have been committed." 927 A.2d at 408. "The [sentencing] court's decision to require that separate sentences be served consecutively in no way increases the penalties for the individual crimes." *Id.* at 407.

Indiana requires judicial factfinding not as a matter of statutory requirement, but as a judicially created requirement. The Indiana Supreme Court noted in *Smylie v. State*, 823 N.E.2d 679, 686 (Ind.), *cert. den. sub nom. Smylie v. Indiana*, 546 U.S. 976 (2005), that the state statutes "do not erect any target or presumption concerning concurrent or consecutive sentences." But the court also confirmed that a finding is required for imposition of consecutive sentences. *Smylie*, 823 N.E.2d at 686 ("an Indiana trial judge may impose a consecutive sentence if he or she finds at least one aggravator"; citations and footnote omitted); *id.* at 686 n. 8 ("Indiana's caselaw has developed to make an aggravating circumstance a requirement before a consecutive sentence may be imposed."). On the question of who must make the factual finding, the Indiana Supreme Court distinguished *Apprendi* and *Blakely* and concluded that "[t]here is no constitutional problem

with consecutive sentencing so long as the trial court does not exceed the combined statutory maximums." *Id.* at 686.

Tennessee law requires the sentencing court to make factual findings by a preponderance of the evidence in order to impose consecutive sentences. T.C.A. § 40-35-115. Tennessee's intermediate appellate court consistently has held that the rule from *Apprendi* and *Blakely* does not apply to those findings. *See State v. Allen*, 2007 Tenn. Crim. App. LEXIS 506, *4-*9 (2007); *State v. Davis*, 2007 Tenn. Crim. App. LEXIS 580, *68-*69 (2007); *State v. Roberts*, 2004 Tenn. Crim. App. LEXIS 1049, *32-*36, *appeal den.*, 2005 Tenn. LEXIS 281 (2005). In doing so, the Tennessee appellate court has explained that "[t]he manner of service of the sentence imposed when a trial court decides whether to impose consecutive sentences—a decision it may make only after the jury has found the defendant guilty of multiple offenses beyond a reasonable doubt—does not usurp the jury's factfinding powers or offend the defendant's due process rights." *State v. Higgins*, 2007 Tenn. Crim. App. LEXIS 763, *42 (2007). "*Apprendi* and *Blakely* establish that the right to jury trial as embodied in the Sixth Amendment applies merely to the findings necessary to establish a defendant's guilt of a specific offense." *State v. Davis*, 2004 Tenn. Crim. App. LEXIS 1106, *31

(2004), *appeal den.*, 2005 Tenn. LEXIS 526 (2005).

In Minnesota, "[i]f a defendant is convicted of multiple current offenses, it is presumed that sentences for these offenses will be served concurrently." *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005). Consecutive sentences may be imposed based on a finding that the multiple offenses were for crimes against persons. *State v. Senske*, 692 N.W.2d 743, 746 (Minn. App.), *review denied* 2005 Minn. LEXIS 302 (2005). The Minnesota Court of Appeals has rejected *Apprendi* challenges to the imposition of consecutive sentences. The court has explained that "the holdings of *Blakely* and *Apprendi* are limited to the enhancement of a sentence for a single crime and do not extend to consecutive sentencing, which determines the relationship between two or more sentences separately imposed for different offenses." *Rannow*, 703 N.W. at 581. Because consecutive sentencing "involves separate punishments for discrete crimes[,]" there is no basis to apply *Apprendi* and *Blakely* to those determinations "any more than [they] would require a jury determination whether multiple sentences are permissible." *Senske*, 692 N.W.2d at 749.

In Alaska, "before a sentencing judge imposes consecutive sentences that total more than the maximum sentence for a defendant's most serious offense, the judge must expressly find that the

total sentence is necessary to protect the public." *Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005) (footnote omitted). The Alaska Court of Appeals rejected the argument that *Apprendi* and *Blakely* principles require a jury to make that finding. *Id.* at 361-63. The court explained that "[t]he facts that a jury finds are not essential to the lawful imposition of consecutive sentencing" and that "[w]hen a judge is sentencing a defendant on more than one conviction in a single judgment * * * the jury retains its power to find the facts underlying each count and underlying the 'statutory maximum' that a judge has authority to impose on any single count." *Id.* at 363.

Finally, in Colorado, a trial court has authority to impose consecutive sentences in some but not all cases, depending on the facts. *People v. Clifton*, 69 P.3d 81, 84 (Colo. App. 2001), *reaff'd in part*, 74 P.3d 519 (Colo. App. 2003). But a court is required to impose consecutive sentences when "[a] person [is] convicted of two or more separate crimes of violence arising out of the same incident." C.R.S. § 18-1.3-406(1)(a), formerly numbered C.R.S. § 16-11-309(1)(a). The Colorado Court of Appeals held that the rule from *Apprendi* did not extend to that determination. *Clifton*, 69 P.3d at 83-86. The court concluded that "the Supreme Court's concern in *Apprendi* was whether the sentencing court had, on the basis of facts found by the court and not the jury,

exceeded the sentence for a particular count." *Id.* at 85. The court held that the imposition of consecutive sentences did not violate *Apprendi* because "[w]hen defendant's sentence on each count is viewed separately, each sentence he received was less than the statutory maximum prescribed for the offense." *Id.* at 86; *see also People v. Lehmkuhl*, 117 P.3d 98, 106-08 (Colo. App. 2004), *cert. den. sub nom. Lehmkuhl v. People*, 2005 Colo. LEXIS 719 (2005), *cert. den.* 546 U.S. 1109 (2006) (following *Clifton* and reaching same result in post-*Blakely* case).

B. Oregon now joins the minority of state courts which have broadly construed *Apprendi* and *Blakely* to apply to the factual determinations necessary for imposition of consecutive sentences.

Only two other state courts—the Ohio and Washington Supreme Courts—have reached the same conclusion as the Oregon Supreme Court on this issue. Under Ohio's statutes, consecutive sentences "may not be imposed except after additional factfinding by the judge." *Ohio v. Foster*, 109 Ohio St. 3d 1, 2006 Ohio 856, 845 N.E.2d 470, *cert. den. sub nom. Foster v. Ohio*, 127 S. Ct. 442 (2006). The *Foster* court summarily announced, without any analysis, that "because the total punishment increases through consecutive sentences only after judicial findings beyond

those determined by a jury or stipulated to by a defendant, [the Ohio statute] violates principles announced in *Blakely*." 845 N.E.2d at 491.

In addition to the scarce analysis from the court, its holding appears to be based, in part, on the misapprehension that its statute and requirement for findings was unique. *See id.* ("[w]hile other state courts have held that their statutes on consecutive sentences do not violate *Blakely*, Ohio appears to be unique in having a rule that sentences of imprisonment shall be served concurrently"; citations and footnote omitted). Yet Ohio's sentencing structure is not unique when compared with the other states in which appellate courts have considered and rejected the broad application of *Apprendi* and *Blakely* to consecutive sentences. Whether dictated by statute or judicial construction, each of the seven states discussed above—like Ohio—requires factfinding to impose a consecutive sentence. The different results in Ohio (and now Oregon) and other states cannot be explained away by any differences in state-law requirements for imposition of consecutive sentences. Instead, any differences are predicated on distinctly different readings of the scope of *Apprendi* and *Blakely*.[6]

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[6] In *Foster*, the Ohio Supreme Court excised the requirement of a finding as a basis for impo-

Washington also has applied *Apprendi* and *Blakely* to sentences in the aggregate rather than limiting their application to each individual sentence. But the picture that emerges from that state is clouded. Indeed, the two lead Washington cases on the issue appear to be directly at odds with each other.

In *State v. Cubias*, 155 Wn. 2d 549, 120 P.3d 929 (2005), the Washington Supreme Court held that the imposition of consecutive sentences under Washington's consecutive-sentencing statute did not violate the principle set forth in *Apprendi* and *Blakely*. The consecutive sentences were based on a judicial finding that convictions for three counts involving three different victims arose out of "separate and distinct criminal conduct[.]" 120 P.3d at 930-31. The court determined that *Apprendi* and *Blakely* were not concerned with consecutive sentences, but only whether the sentence for a single count exceeded the statutory

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sition of consecutive sentences. 845 N.E.2d at 497-98. Although sentencing courts in Ohio now have inherent authority to impose consecutive sentences, the Ohio Supreme Court felt compelled to rewrite a legislatively enacted policy based solely on its interpretation of federal constitutional law. Thus, the holding is significant even if it has minimal impact on defendants currently being sentenced in Ohio.

maximum, and the court rejected the challenge to the consecutive sentences. *Id.* at 931-33; *see also State v. Louis*, 155 Wn. 2d 563, 120 P.3d 936, 940 (2005) ("the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense").

Yet the Washington Supreme Court made the opposite determination for consecutive sentences imposed under a different portion of the statute, which requires courts to first find an aggravating factor. In *In re VanDelft*, 158 Wn. 2d 731, 147 P.3d 573, 578-79 (2006), *cert. den. sub nom. Washington v. VanDelft*, 127 S. Ct. 2876 (2007), the court held that *Apprendi* applied simply because a finding was required. The court distinguished *Cubias* as based on a portion of the sentencing statute that did not establish a presumption of concurrent sentences. *Id.*

The lead Washington cases are difficult to reconcile. Both statutory provisions require judicial fact-finding to impose consecutive sentences. As Justice Kistler noted in his dissent in this case, the statutes are "analytically identical" for *Apprendi* purposes with "[t]he only difference" being that the statute at issue in *VanDelft* posed the *Apprendi* issue "in a more obvious way." App. 45 n. 5. In any event, for purposes of this petition it is clear that at least some consecutive sentences

in Washington are subject to *Apprendi* and *Blakely*.

Oregon now joins Ohio and Washington as the only states to have determined that the principles announced in *Apprendi* and *Blakely* apply not only to the sentences imposed for individual offenses, but also to the aggregate sentence imposed through consecutive sentencing. This Court should grant the petition to resolve the uncertainty about the application of *Apprendi* and *Blakely* to consecutive sentencing and to establish a uniform application of the federal constitutional jury-trial right for all states.

II. The Oregon Supreme Court's decision improperly expands *Apprendi* and *Blakely* to apply to all aspects of a defendant's total sentencing rather than limiting those cases to ensuring that a jury properly considers each element of a single offense.

The Oregon Supreme Court majority construed *Apprendi* and *Blakely* to stand broadly for the proposition that any fact that extends a defendant's sentence—even when viewed in the aggregate—must be determined by a jury. The dissent read those decisions as addressing only the more narrow concern that the state may not avoid proving elements of a crime by recharacterizing them as factors related solely to punish-

ment. As the dissent explains, the majority's conclusion "marks an abrupt departure from years of tradition[,]" and is "at odds with the holdings and reasoning of" this Court's cases by extending beyond the reach of the narrow question this Court addressed in *Apprendi* and *Blakely*. App. 33, 43.

As an initial matter, nothing in this Court's cases purports to address consecutive sentences or the aggregate punishment for multiple crimes. In both *Apprendi* and *Blakely*, this Court addressed a narrow question—the validity of an individual sentence that exceeded the statutory maximum for a single offense. In neither case, or any subsequent case, did this Court address whether *Apprendi* and *Blakely* apply only to the sentence imposed for a single offense or more broadly to aggregate sentences imposed for multiple offenses.

Indeed, the only discussion about consecutive sentences in *Apprendi* suggests that the *Apprendi* rule does not extend to that determination. The Court began by explaining that the narrow issue involved a particular sentence for a particular offense on a particular count and that the fact that the defendant's sentence fell within the authorized *aggregate* maximum was irrelevant. *Apprendi*, 530 U.S. at 474. The Court specifically set aside, as irrelevant to this narrow issue, the argument that a judge could have imposed a consecutive sentence on two other counts to reach

the same sentence imposed on the single count. *Id.* "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* The sentences on the other counts were not relevant to the issue before the Court. *Id.* Thus, in *Apprendi*, this Court did not even consider, let alone hold, that judicial factfinding for imposition of consecutive sentences violates the constitution. Similarly, in *Blakely*, the Court considered only the validity of an individual sentence imposed for a single offense. 542 U.S. at 298-99. Again, the Court noted that a sentence on a separate offense was not relevant to the issue before the Court. *Id.* at 299 n. 2.

While it remains possible that the Court's narrow focus on the individual sentences rather than the aggregate sentences reflected merely the specific facts of the cases before it, as the Oregon Supreme Court majority presumed, other aspects of the cases strongly suggest otherwise. *Apprendi* is predicated on a defendant's right to have a jury find, beyond a reasonable doubt, the elements of an offense (*i.e.*, the facts that are "necessary to constitute a statutory offense"). *See Apprendi*, 530 U.S. at 476-78, 483-84 (identifying those as underlying constitutional principles); *see also United States v. Gaudin*, 515 U.S. 506, 511 (1995) ("[t]he Constitution gives a criminal defendant

the right to demand that a jury find him guilty of all the elements of the crime with which he is charged"); *In re Winship*, 397 U.S. 358, 364 (1970) ("the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"). And, as this Court explained in *Booker*, the *Apprendi* rule was a response to "a new trend in the legislative regulation of sentencing" that shifted from indeterminate sentencing to defined sentences with enhancements based on the finding of additional "sentencing factors." *Booker*, 543 U.S. at 236-37.

Apprendi protected the jury-trial right by providing a legal framework to determine whether a fact that state law ostensibly describes as a "sentencing factor" is more accurately characterized as an element of the underlying offense. Under *Apprendi*, the legislature is deemed to have created the functional equivalent of a "greater" offense, with an additional element, when it provides that a factual finding made at sentencing authorizes a punishment in excess of the statutory maximum that would otherwise be available for the offense. *Apprendi*, 530 U.S. at 494, n. 19. Short of that, the legislature is free to create "sentencing factors" that affect a defendant's sentence *within* the statutory maximum, and those factors need not be submitted to the jury or

proven beyond a reasonable doubt. *Harris v. United States*, 536 U.S. 545, 549-50 (2002).

The Oregon Supreme Court wrongly extrapolated broad principles from *Apprendi* and *Blakely* that go beyond this Court's concern with the required proof for each element of a particular offense. As Justice Kistler explained in dissent, "the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature's effort to redefine the elements of a single offense will stay within constitutional bounds." App. 41-42. That narrower focus is discernible from the very rule itself: "[o]ther than the fact of a prior conviction, any fact that increases the penalty for *a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added). That is, the proper focus is on the elements of (and punishment for) the individual crime.

Consecutive sentences do not increase penalties for the individual offenses and do not increase the stigma associated with the individual convictions. *See Apprendi*, 530 U.S. at 484, 495 (noting both "the loss of liberty and the stigma attaching to the offense" as concerns underlying procedural protections in criminal prosecutions). Nor do consecutive sentences transform the individual offenses into greater offenses or create additional elements that implicate a defendant's

right to have a jury find, beyond a reasonable doubt, all of the elements of the offense. The judicial determination that there should be no "free crime" and that an offender should be punished for each crime of conviction neither alters the maximum penalty for any of the crimes committed nor creates a separate offense calling for an additional penalty. Nothing in the history of the common law or the Sixth Amendment prohibits a judge from deciding that multiple sentences should be served in a way that imposes meaningful punishment for each crime of conviction and nothing suggests that those decisions intrude on the jury's role.

The Oregon Supreme Court majority's expansive reading of the *Apprendi* rule also creates considerable tension with this Court's non-*Apprendi* Sixth Amendment precedent. On a different Sixth Amendment issue, this Court held that "[t]he Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, *and its scope does not change where a defendant faces a potential aggregate prison term* in excess of six months for petty offenses charged." *Lewis v. United States*, 518 U.S. 322, 323-24 (1996) (emphasis added). In *Lewis*, this Court addressed the distinction for Sixth Amendment purposes between "serious" offenses, to which the Sixth Amendment right to a jury trial attaches, and "petty" offenses, to which it does not. *Id.* at

325. A maximum prison term greater than six months indicates that the legislature considered the offense serious and, therefore, the Sixth Amendment right to a jury trial attaches. *Id.* at 326. The Court held that, to determine whether the right to a jury trial attaches when a defendant is charged with multiple offenses, a court must look to the maximum penalty for each of the individual offenses, rather than the aggregate maximum. *Id.* at 323-30. The Court specifically rejected the notion that the aggregate penalties could transform petty offenses into serious offenses: "The fact that petitioner was charged with two counts of a petty offense * * * [does not] transform the petty offense into a serious one." *Id.* at 327.

If the Sixth Amendment right to a jury trial at the front end of the criminal justice proceeding is limited to individual offenses and not to the aggregate, the scope should be limited in the same manner at the back end of the process. If the aggregate maximum punishment is immaterial for determining whether the Sixth Amendment right attaches at the front end, it should also be immaterial at sentencing under the principles announced in *Apprendi* and *Blakely*. The Oregon Supreme Court majority's opinion appears at odds with this Court's holding in *Lewis* and offers no basis for distinguishing the scope of the Sixth

Amendment's jury-trial guarantee in the two substantially similar legal contexts.

This Court should grant the petition to address the scope of *Apprendi* and *Blakely* and the apparent inconsistencies between the Oregon Supreme Court's decision and this Court's Sixth Amendment precedent.

III. This case provides an excellent vehicle to resolve this unsettled question about whether the Sixth Amendment jury-trial right applies to aggregate sentencing determinations.

This Court's landmark decisions in *Apprendi* and *Blakely* have had a profound impact on sentencing practices throughout this country and have resulted in waves of litigation and new legislation. The meaning and scope of *Apprendi* have been among the most pressing issues in criminal law in recent years. Many of the questions have been resolved, but it is clear that the issue presented in this petition—one that has created at least a 7-3 split among state courts—can be settled only by this Court.

The importance of this issue can be seen in courtrooms daily. Consecutive sentencing is one of the crucial tools used to impose meaningful punishment for each separate conviction where warranted. Traditionally, that determination has been made by the sentencing court. In the major-

ity of states that have considered the issue, the sentencing court retains that traditional authority. But Oregon judges have now lost their traditional role in this critical area because of uncertainty about the scope of the Sixth Amendment jury-trial guarantee addressed by this Court in *Apprendi* and *Blakely*. And the policy choice implemented through the Oregon legislative process—like the choice made in Ohio and Washington—has been struck down based on an uncertain reading of this Court's precedent.

This case provides an excellent vehicle for resolving this important and recurring question of the scope of the Sixth Amendment jury-trial guarantee and its application to consecutive sentencing. The question was squarely raised in the Oregon Supreme Court and the issues were well-briefed on both sides. As the Oregon court made clear, there are no procedural impediments to this Court's review of the issue. The claim was adequately preserved in the trial court and properly presented in the state appellate courts. The Oregon Supreme Court considered—and rejected—the possibility that the question could be resolved on state statutory or state constitutional grounds. The majority and dissenting opinions are well-analyzed and mirror the fundamental split that has divided state appellate courts on this issue.

This Court has rejected petitions raising this issue in other cases. But in some of those cases, the issue had not been presented to the state sentencing court or other procedural impediments may have limited the Court's ability to resolve the question. Until the Oregon Supreme Court decision, the split among the state courts was not well-defined because the Ohio Supreme Court had "fixed" the problem by excising some of the statutory requirements for factfinding and because the Washington caselaw was confusing. Now, the split is sufficiently developed and warrants this Court's review at this time.

The issue presented in this petition is pending before this Court in *Black v. California*, 07-6140 (petition filed August 24, 2007; brief in opposition filed December 10, 2007; scheduled for consideration at this Court's conference on January 11, 2008). As California has argued in its brief in opposition, that state does not require judicial factfinding as a prerequisite to the imposition of consecutive sentences. If California's contention is correct, the issue that has divided the state courts is not squarely presented in *Black*.[7] In ad-

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[7] If California's contention is not correct, then the split on this issue is at least 8-3, with one of the largest states taking the opposite view of *Apprendi* and *Blakely* than did the Oregon Supreme Court. *See People v. Black*, 41 Cal. 4th 799, 62 Cal.

dition, there are other potential barriers to the Court's reaching this issue in that case. If, however, this Court grants Black's petition for a writ of certiorari, it should grant review in this case and consolidate the two.[8] This case presents the better vehicle for deciding this important question under the Sixth and Fourteenth Amendments as construed in *Apprendi* and *Blakely*, and granting the petition in this case will ensure that no "vehicle" problems prevent this Court from reaching this significant issue.

CONCLUSION

This Court should grant the petition for a writ of certiorari in order to clarify the scope of *Apprendi* and *Blakely*, and to clarify whether the Sixth Amendment jury-trial guarantee applies to

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Rptr. 3d 569, 161 P.3d 1130, 1144-45 (2007). In *Black*, the California Supreme Court rejected the defendant's argument that *Apprendi* and *Blakely* require a jury determination of facts to support imposition of consecutive sentences. Even if the California court's holding is based, in part, on the discretionary nature of the state's sentencing law, it is clear that the court takes a narrower view of the scope of *Apprendi* and *Blakely* than the Oregon Supreme Court took in this case.

[8] Alternatively, this Court could hold this case until it decides *Black*.

sentencing in the aggregate or is limited to ensuring jury consideration of the elements of a single offense.

Respectfully submitted,
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January 4, 2008

APPENDIX

App. 1

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,

Respondent on Review,

v.

THOMAS EUGENE ICE,

Petitioner on Review.

(CC 99C49779; CA A111668; SC S52248)

On review from the Court of Appeals.*

Argued and submitted November 1, 2006.

Ernest G. Lannet, Deputy Public Defender, Salem, argued the cause and filed the briefs for petitioner on review. With him on the briefs were Peter A. Ozanne, Executive Director, and Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jonathan H. Fussner, Assistant attorney General, Salem, argued the cause and filed the briefs for respondent. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

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* Appeal from Marion County Circuit Court, Dennis J. Graves, Judge. 178 Or App 415, 39 P3d 291 (2001).

Before De Muniz, Chief Justice, and Carson, Gillette, Durham, Balmer, Kistler, and Walters, Justices.**

GILLETTE, J.

The question in this criminal case is whether the state or federal constitution requires that a jury, rather than a judge, find the facts that Oregon law requires be present before a judge can impose consecutive sentences. Over defendant's objection, the trial court in the present case imposed consecutive sentences based on its own factual findings. The Court of Appeals affirmed the trial court's judgment without opinion. *State v. Ice*, 178 Or App 415, 39 P3d 291 (2001). We allowed defendant's petition for review and now reverse the decision of the Court of Appeals and the judgment of the trial court.

Defendant managed an apartment complex where the 11-year-old victim, her mother, and younger brother lived. On two occasions, defendant entered into the family's apartment at night. On each occasion, defendant went into the victim's bedroom and touched her breasts and then her vagina.

** Carson, J., retired December 31, 2006, and did participate in the decision of this case. Linder, J., did not participate in the consideration or decision of this case.

Based on those acts, a grand jury indicted defendant for committing six crimes. The indictment alleged that defendant twice committed first-degree burglary by entering the victim's apartment with the intent to commit sexual abuse. The indictment also alleged that, during each burglary, defendant committed two acts of first-degree sexual abuse; specifically, the indictment alleged that, on each occasion, defendant touched the victim's breasts and then her vagina. Defendant pleaded not guilty. The case was tried to a jury. After considering the evidence, the jury convicted defendant of all six charges.

Before the sentencing hearing, the parties submitted sentencing memoranda. Regarding the length of the sentences, the state recommended that the trial court impose enhanced or upward departure sentences on the two burglary convictions and also on the two sexual abuse convictions based on touching the victim's vagina. It did not argue that the court should impose departure sentences on the two sexual abuse convictions based on touching the victim's breasts. With respect to the separate question of whether the sentences should run concurrently or consecutively, the state contended that there were two separate criminal episodes based on the two burglaries and that the sentences arising out of each of those criminal episodes should run consecutively

to each other. The state also argued that, within each of the two criminal episodes, the sentence for sexual abuse based on touching the victim's vagina should run consecutively to the sentence for burglary. It recommended, however, that the sentences for sexual abuse based on touching the victim's breasts should run concurrently with the sentences for sexual abuse based on touching the victim's vagina.

In his sentencing memorandum, defendant did not address whether the court should impose departure sentences. Regarding consecutive sentences, defendant agreed that there were two criminal episodes and that ORS 137.123(2) would permit the trial court to impose the sentences arising out of the second episode consecutively to the sentences arising out of the first episode. Defendant noted, however (and the state agreed), that the trial court could impose consecutive sentences *within* each episode only if it made certain factual findings set out in ORS 137.123(5). Defendant did not argue, in his sentencing memorandum, that either the state or federal constitution required a jury to make those findings. Defendant did argue, however, that the two sexual abuse convictions that occurred within each criminal episode should merge and that, to the extent that there might be a factual basis for finding that merger was not appropriate, the

state constitution required a jury to make that factual finding.

After defendant filed his sentencing memorandum but before the sentencing hearing, the United States Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000). Defendant then filed a supplemental memorandum bringing that decision to the trial court's attention. The memorandum recited the holding in that case and then stated, "Accordingly, it is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute." Defendant's memorandum did not purport to explain precisely how *Apprendi* applied to the various sentencing decisions before the trial court. More specifically, defendant did not argue that *Apprendi* applied to departure sentences; that is, he did not argue that, as the United States Supreme Court held four years later in *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004), the rule in *Apprendi* applied not only to sentences that exceeded the statutory maximum, but also to departure sentences that exceeded guidelines sentences but stayed within the statutory maximum.

At the sentencing hearing, the trial court noted that it had received extensive sentencing memoranda from the parties and asked whether

either had anything to add. Defendant clarified one point: He argued that, contrary to his statement in the sentencing memorandum, the question whether the two convictions for burglary (and the attendant sexual abuse convictions) arose out of separate criminal episodes turned on a factual finding that, under the state constitution, the jury had to make.

Having considered the parties' arguments, the trial court rejected defendant's arguments. The court then followed the state's recommendations. It imposed upward departure sentences on the two burglary convictions and the two sexual abuse convictions based on touching the victim's vagina. It did not impose upward departure sentences on the remaining two sexual abuse convictions. It found that the first burglary charge and the two related sexual abuse charges occurred within a single criminal episode, which ordinarily would require that the sentences on those convictions be concurrent unless the court made certain factual findings. *See* ORS 137.123(5) (stating findings necessary to impose consecutive sentences for convictions arising out of a continuous and uninterrupted course of conduct). On that point, the court reasoned:

> "[The c]ourt can impose consecutive sentences [for offenses that occur within a continuous and uninterrupted course of conduct] if the court

> finds [under ORS 137.123(5)] that the criminal offense for which consecutive sentence was contemplated was not merely an incidental violation of a separate statutory provision. I do make that finding in this case, that it was an indication of your willingness to commit more than one criminal offense.
>
> "In addition, I find that in committing a sexual abuse in the first degree that you caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim than you did in count 1. So, as I said, your sentence on count 2 [sexual abuse for touching the victim's vagina] will be consecutive to the sentence [o]n count 1 [burglary]."

The court ordered that the sentence on the remaining sexual abuse conviction run concurrently with the sentence on the sexual abuse conviction for touching the victim's vagina.

The court then found that the second burglary was a "second separate incident" and ordered that the sentence on that conviction run consecutively to the other sentences. Regarding the sexual abuse convictions for touching the victim's vagina and breasts during that second burglary,

the court, applying the same reasoning that it had used in connection with the first burglary, ordered that the sentence on the conviction for sexual abuse based on touching the victim's vagina run consecutively to the sentence for the second burglary, but that the conviction for sexual abuse based on touching the victim's breasts run concurrently with the other sentences.

Defendant appealed. Among other things, he argued that the trial court violated his state and federal constitutional rights both when it imposed departure sentences and when it ordered that the sentences for four of his six convictions run consecutively rather than concurrently. He further contended that, even if he had failed to preserve those issues, the Court of Appeals should reach them under the plain error doctrine. As noted, the Court of Appeals affirmed the trial court's judgment without opinion, and we allowed defendant's petition for review to consider whether either the state or federal constitution requires that a jury rather than a judge find the facts necessary to impose consecutive sentences.

On review, defendant begins by challenging the upward departure sentences that the trial court imposed. Relying on *Apprendi* and *Blakely*, he argues that a jury rather than a judge should have found the facts necessary to impose those sentences. Defendant failed to preserve that objection. He never objected on any ground, either

in his sentencing memorandum or at the sentencing hearing, to imposing an upward departure sentence on any of his convictions.

To be sure, defendant did argue in his sentencing memorandum that the state constitution precluded the trial court from refusing to merge the two sexual abuse convictions unless it did so on facts that a jury rather than a judge found, and he extended that state constitutional argument at the sentencing hearing to consecutive sentences. But defendant never suggested that the same constitutional objection also applied to departure sentences. Rather, in selectively arguing that only certain of the sentencing decisions before the trial court ran afoul of constitutional principles, defendant failed to preserve any claim that the state's request to impose other forms of sentencing—in this case, departure sentences—also presented the same constitutional issue.[1] It

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[1] Defendant did notify the trial court of the United States Supreme Court's opinion in *Apprendi*; however, he did not argue that the holding in *Apprendi* applied to departure sentences—a proposition that was not evident from the decision in *Apprendi* itself, and, indeed, was not fully clarified until the Supreme Court explained it four years later in *Blakely*. *Compare State v. Dilts*, 336 Or 158, 82 P3d 593 (2003), *vac'd and rem'd*, 542 US 934, 124 S Ct 2906, 159 L Ed 2d 809 (2004) (holding that *Apprendi* did not apply to departure sentences), *with State v. Dilts*, 337 Or 645, 103 P3d 95 (2004) (holding,

thus fell to the Court of Appeals to consider this part of defendant's argument—if it considered it at all—under the doctrine of "error apparent on the face of the record." The Court of Appeals did not choose to do that, and we cannot say that the Court of Appeals' choice was legally impermissible. We find no error respecting the imposition of departure sentences.

Defendant also argues that, under both the state and federal constitutions, he had a right to have the jury decide the facts on which the court based its decision to impose consecutive sentences. Before turning to those arguments, we first describe ORS 137.123, which defines when courts may impose consecutive sentences. *See* ORS 137.123(1) (providing that courts may impose consecutive sentences "only in accordance with the provisions of this section"). ORS 137.123 permits consecutive sentences in two different situations. First, ORS 137.123(2) provides that, when a court sentences a defendant for offenses

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on remand in light of *Blakely*, that *Apprendi* applies to departure sentences). Defendant's citation to *Apprendi* was not enough, at that time, to put the trial court on notice that, in defendant's view, the rule in *Apprendi* applied to departure sentences. That is especially true when defendant had raised no objection to imposing departure sentences either in his sentencing memorandum or at the sentencing hearing.

that "do not arise from the same continuous and uninterrupted course of conduct" or when a court sentences a defendant who already is serving a previously imposed sentence, "the court may impose a sentence concurrent with or consecutive to the other sentence or sentences." Second, ORS 137.123(4) provides that, when "a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court" finds one of two facts. If the court finds either:

> "(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> "(b) [that t]he criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or

> threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct,"

then the trial court "has discretion to impose consecutive terms of imprisonment." ORS 137.123(5).

The trial court viewed this as a case involving both statutory bases for imposing consecutive sentences: First, the trial court found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of "separate incident[s]" and, thus, did not "arise from the same continuous and uninterrupted course of conduct." *See* ORS 137.123(2) (stating that criterion). Accordingly, the trial court concluded that it had discretion under ORS 137.123(2) to order that the sentences arising out of the second burglary run consecutively to the sentences arising out of the first burglary. Second, the trial court implicitly found that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a "continuous and uninterrupted course of conduct."[2]

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[2] The trial court did not make that finding explicitly. It did find, however, that the two sets of three offenses occurred during two separate criminal episodes, and it relied on ORS 137.123(5) to impose consecutive sentences.

See ORS 137.123(4) (stating that limitation). As to the latter criterion, and before the trial court could impose consecutive sentences on the burglary and sexual abuse convictions, it had to find either that the convictions for burglary and sexual abuse reflected a "willingness to commit more than one criminal offense" or that the two offenses "caused * * * greater or qualitatively different loss, injury or harm to the victim." *See* ORS 137.123(5)(a) and (b) (stating those criteria for imposing consecutive sentences when multiple convictions arise out of a course of continuous and uninterrupted conduct). As noted, the trial court made both findings consistent with the criteria in *both* ORS 137.123(5)(a) and (b) before deciding that, within each criminal episode, the sentence for one count of sexual abuse would run consecutively to the sentence for burglary.

With that background in mind, we turn first to defendant's arguments under Article I, section 11, of the Oregon Constitution. That section provides, in part, that "[i]n all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]" Defendant urges us to adopt an interpretation of Article I, section 11, that parallels the United States Supreme Court's interpretation of the Sixth Amendment right to a jury trial in *Apprendi* and *Blakely*. Defendant contends that, under this court's decisions, the state constitutional right to a jury trial "extends

to any fact in the commission of the crime that determines the maximum punishment to which the defendant is subject." (Emphasis omitted.)

This court interprets the provision of Oregon's constitution independently of their federal analogues. *See State v. Cook*, 340 Or 530, 540, 135 P3d 260 (2006) (declining to abandon this court's interpretation of Oregon's Confrontation Clause because federal courts had announced a new analysis of the United States Confrontation Clause). As this court explained in *State v. Caraher*, 293 Or 741, 749, 653 P2d 942 (1982), "[w]hen this court gives Oregon law an interpretation corresponding to a federal opinion, our decision remains the Oregon law even when federal doctrine later changes." In a series of three cases, this court announced an independent interpretation of Article I, section 11, before the United States Supreme Court announced its decisions in *Apprendi* and *Blakely*. We begin with those decisions.

In determining whether a criminal defendant has a right to a jury trial on a sentencing factor under Article I, section 11, this court never has suggested that the existence of the right turns on whether the factor extends the length of a defendant's sentence beyond the statutory maximum, as the federal courts have. *Compare State v. Wedge*, 293 Or 598, 608, 652 P2d 773 (1982) (holding that defendant's state jury trial right

applied to a five-year mandatory minimum sentence even though the trial court had imposed a 20-year sentence on the underlying crime), *with Harris v. United States*, 536 US 545, 556-68, 122 S Ct 2406, 153 L Ed 2d 524 (2002) (plurality opinion) (reasoning that the rule in *Apprendi* did not apply to a mandatory minimum sentence that did not extend the defendant's sentence beyond the statutory maximum). Rather, this court has suggested that the right to jury trial under Article I, section 11, turns on whether the fact at issue is an "element of," or "goes to" the criminal act for which the defendant is to be punished. According to the court's usual analysis, *other* facts that might enhance a defendant's sentence, including those that "characterize the defendant," are properly decided by the sentencing court.

Thus, in *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981), this court considered the constitutionality of a death penalty scheme that required trial courts to impose the death penalty on defendants found guilty of murder, if the *court* found either that the defendant had acted deliberately or that there was a probability that the defendant would commit criminal acts of violence that would constitute a threat to society. The *Quinn* court concluded that, because the fact of deliberateness was one of the facts that constituted the crime for which the defendant was to be punished, the scheme violated the right to jury trial

guaranteed by Article I, section 11. The court noted that it had approved of *some* schemes that used post-trial judicial findings to impose a greater sentence—specifically, habitual criminal and sexually dangerous offender statutes—but it explained that those schemes were different from the death penalty scheme because they pertained to a mere status and not to a "part of an act declared by the legislature to be criminal" (as in the death penalty statute). *Quinn*, 290 Or at 406. The distinction could be explained, according to the *Quinn* court, in terms of a "simple principle"—that "facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing court." *Id.* at 405.

Quoting from *State v. Hoffman*, 236 Or 98, 385 P2d 741 (1963), the *Quinn* court indicated that the distinction arises out of the wording of Article I, section 11:

> "'In our opinion, the words "criminal prosecution," as set forth in Article I, section 11 of our constitution, refer to *establishing before a jury acts declared to be criminal by legislative action.*'"

Id. at 405-06 (quoting *Hoffman*, 236 Or at 107 (emphasis added). In other words, according to *Quinn*, Article I, section 11, has no effect on factual determinations that the legislature has de-

nominated as sentencing enhancement, but that are not part of the jury's determination of guilt or innocence, no matter how the legislature has chosen to define the crime at issue.[3]

Later, in *Wedge*, this court appeared to acknowledge that the legislative label does not always resolve the issue. The statute at issue in *Wedge* provided a five-year mandatory minimum sentence when, prior to sentencing on any felony conviction, a trial court found that the defendant had used or threatened to use a firearm during the crime. The court reiterated the general dis-

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[3] It may be less than obvious to present day courts and practitioners that a "criminal prosecution" embraces guilt determinations but not sentencing matters, or that that phrase applies only to proceedings designated as criminal by the legislature. Arguably, the *Quinn* court's interpretation of the words of Article I, section 11, to that effect is incorrect. However, defendant here has made no such argument, but instead has framed his argument entirely in terms of the interpretation currently set out in our cases. As such, we have no occasion to consider the possibility. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 53-54, 11 P3d 228 (2000) (parties wishing to have this court alter existing state constitutional interpretation should do so by presenting principled argument showing how present interpretation was wrong when made or should be altered now); *see also State v. Ciancanelli*, 339 Or 282, 287-319, 121 P3d 613 (2005) (illustrating process).

tinction made in *Quinn* between facts that pertain to the defendant's character and those that are elements of the crime for which the defendant is to be punished and opined that a defendant's sue of a firearm in the course of a crime is "closer to an element of the crime than to a characterization of the defendant." 293 Or at 607. The court went on to explain that, although the statute treated firearm use as a mere sentencing factor, when applied in the context of a robbery conviction, it "in effect * * * create[d] a new crime" of first-degree robbery using a firearm. *Id.* at 608. In other words, the court indicated that it would look beyond the legislative label attached to an enhancement factor to determine whether, in reality, it was an element of the crime for which the defendant was to be punished (and, thus, a fact hat must be determined by the jury).

In the last of this court's Article I, section 11, cases, *State v. Hart*, 299 Or 128, 699 P2d 1113 (1985), the question was whether, when a defendant convicted of second-degree assault was ordered to pay restitution, the amount of the restitution award was a fact that the state had to prove to the jury. Although that fact—the amount of the victim's loss—clearly was not a fact that "characterize[d] the defendant," *see Quinn*, 290 Or at 405 (stating that test), the court did not hold that it automatically followed that it was a fact that Article I, section 11, required a jury to

find. Rather, the court focused on whether the amount of damages was an "element" of the charged crime. *Hart*, 299 Or at 136-37. In analyzing that issue, the court noted that the defendant had been convicted of assault in the second degree, "which is defined as '[i]ntentionally or knowingly caus[ing] serious physical injury to another.'" *Id.* at 137 (quoting ORS 163.175(1)(a)). The court reasoned:

> "The seriousness of the injury inflicted by the defendant is an element of the crime of assault, but the monetary amount of the medical and other out-of-pocket expenses associated with the injury is not. The monetary cost of the injury is neither an element of the crime nor 'an act in the commission of the crime.' * * * *Therefore, while the amount of the restitution order might be termed an element of sentencing, it is not an element of the crime of assault.*"

Id. (emphasis supplied). The court accordingly held that Article I, section 11, did not require that the jury find the amount of the victim's loss. *Id.*

Notably, the *Hart* court did not concern itself with whether the restitution order increased the defendant's punishment. And, although the order

clearly did not pertain to the defendant's character or status, the court seemed to have little trouble in concluding that it was an "element of sentencing" and not an element of the defendant's crime. Presumably it did so based on traditional notions of the proper role of judges in determining a defendant's sentence.

Hart, *Wedge*, and *Quinn* generally may be said to stand for the proposition that questions that arise under Article I, section 11, are to be resolved primarily in terms of whether the fact that authorizes an enhanced punishment is an "element" of the crime for which the defendant is to be punished, regardless of how it has been denominated by the legislature. Inherent in that approach is the idea that *some* facts that may lead to enhanced punishment—for example, those that pertain to the defendant's character or status—are traditionally and properly for the sentencing court. Unfortunately, beyond these two categories of facts that *Quinn* and *Wedge* specifically exclude, the cases do not offer a clear rule for determining whether a fact, the existence of which has been identified by the legislature as a sentencing factor, is an element of the crime. Although the answer to that question may be obvious in most cases, there will be some cases in which courts will simply be making their best call, based on perceptions of the traditional roles

of judge and jury in determining a criminal defendant's punishment.

We turn from the foregoing general description of our precedents to an attempt to apply their collective analysis to the findings that the trial court made in the present case in support of its various decisions to impose consecutive sentences. As noted, the court found three facts in imposing consecutive sentences. First, it imposed consecutive sentences on the two burglary convictions based on a finding that the two burglaries were "separate incidents" and, thus, did not "arise from the same continuous and uninterrupted course of conduct." Second, it announced, as one reason for imposing consecutive sentences for the burglary and sexual assault convictions, that each sexual assault was "not merely incidental" to the commission of the burglaries but instead "was an indication of [defendant's] willingness to commit more than one criminal offense." Finally, the court stated an alternative finding to support its imposition of consecutive sentences on the burglary and sexual assault convictions, *viz.*, that each sexual assault "caused or created a risk of causing [a] greater, qualitatively different loss, injury, or harm to the victim" than the underlying burglary did.

None of those three findings appears to represent an "element" of any offense for which defendant is to be punished. Our reasoning with re-

spect to the second finding—that each sexual assault was "not merely incidental" to the commission of the burglaries but indicated defendant's "willingness to commit more than one criminal offense"—is, perhaps, easiest to explain: At least the latter part of that finding seems to be quintessentially about defendant's character, and both *Quinn* and *Wedge* state that such findings are properly made by the sentencing court.

But our reasoning with respect to the first and third findings also applies to the second one. All three findings involve an assessment of the relationship between two crimes of which defendant is guilty—whether to determine that each crime is a separate incident, was not incidental to the other crime, or caused a different loss than did the other crime. Because all three findings involve a comparison between *two* crimes for which defendant is to be punished, none of the three can reasonably be deemed to constitute an *element* of either crime. Moreover, that sort of comparison between a defendant's crimes is precisely the sort of determination that sentencing courts traditionally have made and used to support their decisions to impose consecutive sentences. Nothing in *Quinn*, *Wedge*, or *Hart* suggests that sentencing courts are precluded from continuing in that tradition (and, in fact, they appear to be striving to maintain it).

We conclude that none of the three findings at issue went to an "element" of any crime for which defendant was to be punished. As such, the fact that the trial court made the findings did not violate defendant's right to a jury trial under Article I, section 11, of the Oregon Constitution.

We turn to defendant's arguments under the Sixth Amendment to the United States Constitution. Notably, the Supreme Court of the United States has rejected, for purposes of the Sixth Amendment, the analytical line that this court has taken in the past (and that we have described above) with respect to Article I, section 11. That is, the Court has indicated that it is wrong to allow the scope of the right to a jury trial to depend on the label "element" or "sentencing factor"—that the legislature chooses to assign to a factual issue. *Blakely*, 542 US at 306. It also has criticized judicial attempts to look beneath the legislative labels in this area, as this court did in *Wedge*, on the ground that such analytical efforts are inevitably subjective and manipulable. *Id.* at 307-08. Ultimately, the court rejected the idea that the Framers of the Sixth Amendment would have thus

> "left definition of the scope of jury power up to a judges' intuitive sense of how far is *too far*. We think that claim [that the Sixth Amendment should be deemed to permit courts,

> rather than juries, to decide facts that *courts* deem to be mere 'sentencing factors'] not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."

Id. at 308 (emphasis in original).

Thus, in a series of cases, beginning with *Jones v. United States*, 526 US 227, 119 S Ct 1215, 143 L Ed 2d 311 (1999) and ending, for the moment, with *Cunningham v. California*, ___ US ___, 127 S Ct 856, 166 L Ed 2d 856 (2007), the United States Supreme Court has opted for a "bright line" rule when confronted with the sort of claims that we now are considering under the Sixth Amendment in this case. That rule is most succinctly stated in *Apprendi*: "Other than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490 (emphasis supplied). In *Apprendi*, the court applied that rule in concluding that a defendant's Sixth Amendment rights had been violated when a trial court imposed a prison term that exceeded the statutory maximum for the crime for which the jury had convicted the defendant, based on the trial court's

own determination that defendant had committed the crime for racially motivated reasons. *Id.* at 491. Similarly, in *Blakely*, the court employed that rule when it held that the Sixth Amendment was violated when a trial court imposed a sentence that exceeded the statutory maximum for the crime—second-degree kidnapping—that the jury had convicted him of, based on the trial court's own determination that the defendant had acted with "deliberate cruelty." *Blakely*, 542 US at 301-14.

In *United States v. Booker*, 543 US 220, 236, 125 S Ct 738, 160 L Ed 2d 621 (2005), the Court explained its rationale for adopting the foregoing rule. First, it noted that, with the advent of determinate sentencing schemes, it had been forced to consider "the significance of facts selected by legislatures that * * * increased the range of sentences possible for the underlying crimes." Under sentencing schemes that permitted trial judges to impose a sentence that exceeded the statutory maximum for an offense, based on finding certain sentencing factors, "[i]t became the judge, not the jury, who determined the upper limits of sentencing, and the facts determined were not required to be raised before trial or proved by more than a preponderance" of the evidence. *Id.* The Court then explained that it had issued its holdings in *Apprendi* and *Blakely* in response to this "new

sentencing practice." *Id.* at 237. The Court reasoned:

> "As it thus became clear that sentencing was no longer taking place in the tradition [of judicial discretion in sentencing] that Justice Breyer invokes [in his dissenting opinion], the Court was faced with the issue of preserving an ancient guarantee [to trial by jury] under a new set of circumstances. The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. *And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led [the Court] to the answer first considered in* Jones *and developed in* Apprendi *and subsequent cases culminating with this one.*"

Id. (emphasis added). We believe that the foregoing statement from *Booker* makes it inescapably clear that the rule in *Apprendi* and *Blakely* is not directed at the traditional discretion of judges to select a sentence *within a range that the legisla-*

ture has selected and the jury's verdict determines, but at sentencing schemes that permit or require judges to impose sentences that are *longer* than sentences that a jury's verdict alone would authorize.

Obviously, in the context of that concern, it does not matter that a factual determination is of a type that traditionally has been made by judges in the exercise of their sentencing discretion. The concern is with facts that increase a defendant's sentence beyond the prescribed maximum for the crime that *the jury* determined that the defendant committed. Under *Apprendi*, *Blakely*, and their progeny, those facts must themselves be decided by a jury.

Does the *Apprendi* rule apply to the present circumstance, *i.e.*, to factual findings that do not increase the sentence for any individual count but that authorize imposition of consecutive sentences? The state contends that it does not. The state notes that, as it is stated and applied in *Apprendi*, *Blakely*, and *Booker*, the rule is predicated on an increase beyond the prescribed statutory minimum "for a crime." It then argues:

> "The relevant statutory maximum for *Apprendi* purposes is the maximum sentence for each separate, individual offense. The consecutive-sentencing determination is a quintessential

> sentencing determination that *transcends* each offense and only becomes relevant when a jury has already convicted a defendant beyond a reasonable doubt of two or more offenses. When a trial court imposes consecutive sentences, it imposes a sentence that is *within* the statutory maximum for each of the offenses and then orders them to be served consecutively. Accordingly, consecutive sentences do not implicate the rule from *Apprendi*."

We think, however, that in so arguing, the state ignores many statements in the cases that describe the problem in terms that are *not* offense specific but that focus, instead, on the quantum of punishment. For example, in *Apprendi*, the court insisted that

> "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict."

530 US at 494 (emphasis added).

More importantly, consecutive sentencing as it occurred in the present case clearly implicates the *principles* expressed in *Apprendi*, *Blakely*, and *Booker*, even if it does not mirror the specific

circumstances in those cases. It is important to recognize, in that regard, that, under ORS 137.123, consecutive sentencing in this state is not simply a matter of judicial discretion, but can be imposed only after the sentencing judge has made certain legislatively required findings.[4] At least with respect to offenses that arise out of the same continuous and uninterrupted course of conduct, the jury's issuance of multiple guilty verdicts will *only* support concurrent sentences, unless the judge makes those required findings.

As we have suggested, that arrangement conflicts with the principles underpinning *Apprendi*, *Blakely*, and *Booker*, if not with the *Apprendi* rule itself. Under the statutes that we just have described, the maximum aggregate sentence that

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[4] Under ORS 137.123(2), a court *may* impose either concurrent or consecutive sentences if the underlying offenses "do not arise from the same continuous and uninterrupted course of conduct." Under ORS 137.123(4) and (5), for criminal offenses arising out of a continuous and uninterrupted course of conduct, the sentences "shall" be concurrent unless the court finds one of two facts: (1) that the second crime is not merely incidental to the first but indicates a willingness to commit more than one criminal act; or (2) that the second crime caused or created a risk of greater or qualitatively different injury than the first crime or caused or created a risk of injury to a different victim than the victim involved in the first crime.

may be imposed, based solely on the jury's verdicts and without judicial factfinding, when a defendant is convicted of multiple offenses, assumes that all the sentences run concurrently. But, under the same statutes, additional factfinding—*judicial* factfinding—is required to justify consecutive sentencing. Under that arrangement, a consecutive sentence necessarily "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Apprendi*, 530 US at 494, based on judicial factfinding[5]—and thereby violates the principles discussed in *Apprendi* and *Blakely*.

We acknowledge that most other courts that have considered this question have reached a different conclusion, usually on the ground that *Apprendi* and its progeny announce a narrow rule that should only be applied in the circumstances in which the United States Supreme Court heretofore has demanded its application. *See, e.g.*, *State v. Cubias*, 155 Wash 2d 549, 120 P3d 929 (2005); *People v. Black*, 41 Cal 4th 799, 161 P3d 1130 (2007); *People v. Wagener*, 196 Ill 2d 269, 752 NE2d 430, *cert den sub nom Wagener v. Illinois*, 534 US 1011 (2001) (all to that effect). The

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[5] It is self-evidence, we trust, that a defendant is exposed to greater punishment if he is required to serve multiple sentences consecutively, rather than concurrently.

dissent takes the same view. However, we disagree fundamentally with the proposition that the *Apprendi* rule is a narrow one. In fact, we think that the opposite is true—*i.e.*, we think that the rule of *Apprendi* and its progeny establishes the right to a jury trial respecting whatever factors a legislature has identified as permitting the enhancement of an otherwise statutorily limited sentence. The fact that the Court has yet to speak *specifically* to consecutive sentencing in this respect seems to us to prove only that it has not yet had a case on the subject. The *Apprendi*, *Blakely*, and *Booker* decisions all go to great lengths to discuss the broad principles underpinning their particular holdings.[6] It would be wrong for us to engage in an adamantine refusal to get the message.

We think that the application of the *Apprendi* cases to the present problem is obvious. In the present case, the trial court, over defendant's objection, made a number of findings, already iden-

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[6] For example, in *Booker*, the Court was unimpressed with arguments that the *Apprendi* rule applies narrowly to "any fact that increases the penalty for a crime beyond the prescribed *statutory* minimum" and does not pertain where the prescribed minimum is set by a Commission. The Court emphasized that "[m]ore important than the language used in our holding in *Apprendi* are the principles we sought to vindicate." *Booker*, 543 US at 238.

tified, to support its decision to order defendant to serve his sentence on Count 4 (the second burglary count) consecutively to Count 1 (the first burglary count) and Count 2 and Count 5 (the two sexual abuse counts) consecutive to their respective burglaries. Those findings satisfied the requirements of ORS 137.123(2), (4), and (5) for imposition of consecutive sentences. However, the findings were not made by a jury, but were used to increase defendant's punishment beyond the aggregate statutory maximum that the jury's verdict alone would support.[7] The trial court thus imposed the consecutive sentences based on its own fact-finding and in violation of [illegible]s Sixth Amendment rights. Th[illegible] was error under the rule of *Apprendi* and *Blakely*, as we understand it. The trial court's error was then sustained by the Court of Appeals. That, too, was error. The case must be remanded to the trial court for resentencing.

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[7] One might argue that the trial court's finding that the two burglary counts did not arise from the same continuous and uninterrupted course of conduct inheres in the very fact that the jury found defendant guilty of two separate counts of the same crime. However, given that the indictment did not specify particular dates or otherwise distinguish between the two counts, we do not choose to analyze the case that way.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

KISTLER, J., dissenting.

The majority holds that the rule in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), applies to the question whether a trial court should impose multiple sentences concurrently or consecutively. The majority's decision marks an abrupt departure from years of tradition; it converts what historically has been an issue for trial judges into a federal constitutional question for juries. Neither the holding in *Apprendi* nor its reasoning supports extending that decision to the question of consecutive sentencing. Almost every court that has considered this question has held that *Apprendi* does not apply in this context. I agree with those decisions and respectfully dissent from the majority's contrary holding.

When a jury finds a defendant guilty of multiple offenses, a trial court must decide whether the defendant should serve the resulting sentences concurrently or consecutively; that is, the trial court must decide whether the sentences should run simultaneously or whether the defendant should not begin serving the sentence for one offense until the sentence for the other of-

fense ends. As the Court has recognized, the decision whether to impose concurrent or consecutive sentences rests in the sound discretion of the trial court. *See Callahan v. United States*, 364 US 587, 597, 81 S Ct 321, 5 L Ed 2d 312 (1961) (recognizing principle). As one commentator has described it, a trial court's discretion to make that decision is "[f]irmly rooted in common law." Arthur W. Campbell, *Law of Sentencing*, § 9.12 at 278 (2d ed 1991).

Oregon, like many states, has codified the bases for making that discretionary decision; that is, the legislature has said that a court may exercise its discretion to impose consecutive sentences if it finds (1) that the offenses did not occur as part of the same course of conduct or (2) even if the offenses occurred as part of the same course of conduct, one offense was not incidental to the other or the two offenses resulted in separate harms. ORS 137.123. Because Oregon's statute requires those factual findings as a predicate to imposing consecutive sentences and because consecutive sentences result in a longer aggregate sentence than concurrent sentences, the majority concludes that *Apprendi* applies to the decision to impose consecutive sentences.

Apprendi does not sweep as broadly as the majority perceives. Rather, the Court has been careful to explain that not "every fact with a bearing on sentencing must be found by a jury." *Jones v.*

United States, 526 US 227, 248, 119 S Ct 1215, 143 L Ed 2d 311 (1999). And it has not extended the reach of *Apprendi* beyond the issue that gave rise to it—the problem posed by determinate sentencing schemes that enhance a defendant's sentence beyond the statutory maximum for a single offense on the basis of facts that a judge (rather than a jury) finds by a preponderance of the evidence (rather than beyond a reasonable doubt). *See United States v. Booker*, 543 US 220, 236-37, 125 S Ct 738, 160 L Ed 2d 621 (2005) (explaining that problem posed by determinate sentencing schemes gave rise to the rule in *Apprendi*). The majority errs in extending the rule in *Apprendi* farther than either the holding or the reasoning in that case warrants.

The issue before the Court in *Apprendi* was narrow. In that case, and the cases that have followed it, a trial court had enhanced a defendant's sentence for a single offense beyond the statutory maximum authorized for that offense based on a fact that the court had found during sentencing by a preponderance of the evidence. *See, e.g.*, *Apprendi*, 530 US at 468-69 (describing the defendant's sentence). The constitutional issue before the Court in each of those cases was whether the sentencing factor that the trial court had relied on to enhance the defendant's sentence was, in

effect, an element of the offense that a jury had to find beyond a reasonable doubt.[1]

Faced with that issue, the Court held in *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 US at 490. By its terms, the holding in *Apprendi* does not extend to the question of how a trial court should aggregate multiple sentences. Rather, the holding in *Apprendi* addresses the procedures that a trial court must follow when "the penalty for a crime [exceeds] the prescribed statutory maximum" for *that* crime.

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[1] *Blakely v. Washington*, 542 US 296, 303, 124 S Ct 2531, 159 L Ed 2d 403 (2004) presented a variation on the issue in *Apprendi*: whether a guidelines sentence was a statutory maximum sentence within the meaning of *Apprendi*. The Court held that it was, reasoning that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence that a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 US at 303 (emphasis omitted). In *Booker*, 543 US at 243-44, and *Cunningham v. California*, ___ US ___, 127 S Ct 856, 166 L Ed 2d 856 (2007), the Court held that the rule in *Apprendi* applies respectively to the United States' and California's determinate sentencing schemes; both prescribed mandatory sentencing ranges from which trial courts could impose upward departures only after finding certain facts.

That is, *Apprendi* answers the question what are the elements of a single offense that the state must prove beyond a reasonable doubt. It does not answer the separate question of how a trial court should aggregate multiple sentences when a jury has found a defendant guilty of multiple offenses.

Neither the issue before the Court in *Apprendi* nor the terms of its holding suggest that the Court intended to announce a one-size-fits-all rule that applies to every factual finding that a trial court makes during sentencing—even when the finding affects the length of a defendant's aggregate sentence. To be sure, in the course of describing its reasoning, the Court has sometimes referred broadly to increased or greater punishment. And the majority relies on such a statement to support its holding. But those statements should be viewed in the context of the issue before the Court and not considered in isolation. Doing otherwise attributes more meaning to the words than, in context, they fairly can bear.

Not only is the holding in *Apprendi* narrower than the majority perceives, but the problem that the Court sought to solve demonstrates that the holding does not extend as far as the majority concludes. The Court first noted the problem in *Mullaney v. Wilbur*, 421 US 684, 95 S Ct 1881, 44 L Ed 2d 508 (1975). *See Apprendi*, 530 US at 484 (identifying *Mullaney* as initially recognizing

problem). The Court had explained in *Mullaney* that, without some constitutional check, a state could avoid the due process requirement that it prove every element of a crime beyond a reasonable doubt "merely by 'redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment'" and permitting the trial court to find those factors by only a preponderance of the evidence. *See Apprendi*, 530 US at 485 (quoting *Mullaney*, 421 US at 698) (brackets in original).

Ordinarily, a legislature has broad authority to define (or redefine) the elements of a crime, and the problem that *Mullaney* posed and the Court faced over the next 25 years was how to articulate the limits that the constitution places on that authority. After *Mullaney*, the Court explained in *Patterson v. New York*, 432 US 197, 97 S Ct 2319, 53 L Ed 2d 281 (1977), that the legislature's authority to define the elements of a crime "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental." *Id.* at 201-02 (internal quotation marks omitted). Although the Court recognized in *Patterson* that "there are obviously constitutional limits beyond which the States may not go in this regard," it did not attempt to identify those limits beyond noting that a legislature may not "'declare

an individual guilty or presumptively guilty of a crime.'" *Id.* (quoting *McFarland v. American Sugar Rfg. Co.*, 241 US 79, 86, 36 S Ct 498, 60 L Ed 899 (1916)).

The broad authority that the Court recognized in *Patterson* invited statutes that permitted trial courts to find various "sentencing factors" by a preponderance of the evidence even though those sentencing factors could affect, often dramatically, the length of the sentence that a defendant would have to serve. The Court first addressed those types of statutes in 1986 in *McMillan v. Pennsylvania*, 477 US 79, 106 S Ct 2411, 91 L Ed 2d 67 (1986), and it returned to the issue 12 years later in *Almendarez-Torres v. United States*, 523 US 224, 118 S Ct 1219, 140 L Ed 2d 350 (1998). In each of those cases, the legislature had provided that the length of a defendant's sentence for an offense would turn on facts that the trial court found by a preponderance of the evidence during sentencing,[2] and the issue was whether,

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[2] In *McMillan*, the legislature had directed the trial court to impose a mandatory minimum sentence if the defendant had "visibly possessed" a gun during the commission of the crime. 477 US at 81. In *Almendarez-Torres*, Congress had authorized an enhanced sentence, beyond that authorized for the commission of the crime, if the defendant had a prior felony conviction. 523 US at 226.

as a matter of constitutional law, those sentencing factors constituted elements of the offense.

In resolving that issue, the Court considered, among other things, whether the statute declared the defendant presumptively guilty of a crime, whether proof of the sentencing factor could increase the defendant's sentence "from a nominal fine to a mandatory life sentence," whether the legislature had tailored the sentencing factor "to be a tail which wags the dog of the substantive offense," whether the statute "create[d] a separate offense calling for a separate penalty," and whether the sentencing factor altered the maximum penalty for the offense. *See McMillan*, 477 US at 86-88 (setting out those factors); *Almendarez-Torres*, 523 US at 242-43 (same). Applying those factors, the Court held that the sentencing factors at issue in *McMillan* and *Almendarez-Torres* were not elements of the charged offenses, which the state had to prove beyond a reasonable doubt.

The Court approached the same issue differently in *Apprendi* and held, as Justice Scalia had urged in his dissenting opinion in *Almendarez-Torres*, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490; *see Almendarez-Torres*, 523 US at 251 (Scalia, J.,

dissenting) (reasoning that a similar test should apply). The Court did so, as it later explained in *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004), to avoid the subjectivity inherent in the multi-factor test that the Court had applied in *McMillan* and *Almendarez-Torres*. As the Court explained in *Blakely*, the multi-factor test that it had applied in *McMillan* and *Almendarez-Torres* reduced to nothing more than asking whether in enacting sentencing factors the legislature had gone "too far."[3] Far from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only to provide a non-subjective means of determining when the legis-

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[3] The Court reasoned in *Blakely* that, under the multi-factor test in *McMillan* and *Almendarez-Torres*,

> "legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a 'tail which wags the dog of the substantive offense.' *McMillan*, 477 US at 88. What this means in operation is that the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge. * * * The subjectivity of this standard is obvious."

542 US at 307 (emphasis in original).

lature's efforts to redefine the elements of a single offense will stay within constitutional bounds.

Were there any doubt about the scope of the rule from *Apprendi*, the passage that the majority quotes from *Booker* removes it. As that passage makes clear, the rule in *Apprendi* arose in response to "a new trend in the legislative regulation of sentencing" that the Court first recognized in 1986 in *McMillan* when it "considered the significance of facts selected by legislatures that * * * increased the range of sentences possible for the underlying crime." 543 US at 236. That is, the Court adopted the rule in *Apprendi* to address determinate sentencing schemes that defined the maximum sentence for an offense but permitted a trial court to enhance the sentence for that offense if the trial court found certain "sentencing factors" by a preponderance of the evidence.

The rule in *Apprendi* provides a means for determining whether those "sentencing factors" are elements of the offense that the state has to prove beyond a reasonable doubt. It does not have a broader reach. Indeed, the Court was careful to explain in *Booker* that the rule it announced in *Apprendi* was not intended to displace traditional sentencing practices. As the Court explained, "it is the new circumstances [first recognized in 1986], not a tradition or practice that the new circumstances have superseded, that have led [the Court] to answer first considered in *Jones* and

developed in *Apprendi* and subsequent cases culminating with this one." *Id.* at 237. When the Court has explained, as it did in *Booker*, that the rule in *Apprendi* was intended to solve the problem posed by determinate sentencing schemes, we should be hesitant to extend *Apprendi*'s holding beyond the limits that the Court has identified. That is especially true when, as in this case, extending *Apprendi* displaces authority that trial courts traditionally have exercised—*i.e.*, the authority to decide how to aggregate multiple sentences.

Not only is the majority's decision today at odds with the holdings and reasoning of the Supreme Court's cases, but it is out of line with the clear weight of authority. In states that require factual findings as a predicate to imposing consecutive sentences, almost every court that has considered the issue has held that *Apprendi* does not apply to the decision to impose consecutive sentences.[4] Specifically, the courts in Colorado,

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[4] Procedurally, the decision to impose consecutive or concurrent sentences divides into three categories. First, some states presume, by statute or decision, that sentences should be imposed consecutively but permit "downward departures" from that presumption. Second, other states leave the issue to the unfettered discretion of the trial court. Third, some states, either by statute or judicial decision, require trial courts to find certain facts as

Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, New Jersey, and Tennessee have held that *Apprendi* does not apply to the decision whether to impose consecutive sentences. *See People v. Lehmkuhl*, 117 P3d 98 (Colo Ct App 2004), *cert den*, 546 US 1109 (2006); *People v. Wagener*, 196 Ill 2d 269, 752, NE2d 430 (2001); *Hong v. Sims*, 221 Fed App'x 455 (7th Cir 2007) (considering constitutionality of Illinois sentencing law); *Smylie v. State*, 823 NE2d 679 (Ind), *cert den*, 546 US 976 (2005); *State v. Jacobs*, 644 NW2d 695 (Iowa 2001); *State v. Hunter*, 907 So 2d 200 (La Ct App 2005), *rev den*, 925 So 2d 507 (La 2006); *State v. Keene*, 927 A2d 398 (Me 2007); *State v. Senske*, 692 NW2d 743 (Minn Ct App 2005); *State v. Abdullah*, 184 NJ 497, 878 A 2d 746 (2005); *State v. Davis*, 2007 Tenn Crim App LEXIS 580 (July 19, 2007).

To be sure, there is a split among the states that have considered this recurring issue of federal law—a split that the majority's decision deepens and confirms. One other state has held, as the majority does, that *Apprendi* applies in

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a predicate to exercising their discretion to impose consecutive sentences. Oregon falls into the third category, as do many states. In referring to decisions from other jurisdictions, I refer only to decisions from jurisdictions that, like Oregon, require factual findings as a predicate to imposing consecutive sentences.

this context, *State v. Foster*, 109 Ohio St 3d 1, 845 NE2d 470 (2006), and another state's decisions provide mixed support for the majority's decision. *Compare State v. Cubias*, 155 Wn 2d 549, 120 P3d 929 (2005) (holding that *Apprendi* does not apply to a factual prerequisite to imposing consecutive sentences), *with In re VanDelft*, 158 Wn 2d 731, 147 P3d 573 (2006) (holding that *Apprendi* does apply to a factual prerequisite to imposing consecutive sentences).[5] Although the majority can count at least one and perhaps two states in its corner, the overwhelming number of state courts (and federal courts considering the constitutionality of state sentencing statutes) have held that *Apprendi does not apply to the decision to impose consecutive sentences. Because I would not extend the rule in Apprendi* beyond either the issue or the problem that the Court sought to solve in that case, I respectfully dissent.

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[5] In *Cubias*, a state statute required the trial court to find that the offenses arose out of separate and distinct criminal conduct as a prerequisite to imposing consecutive sentences. 155 Wn 2d at 552. In *VanDelft*, a state statute presumed that the sentences would be concurrent but permitted the trial court to impose consecutive sentences if it made certain factual findings. 158 Wn 2d at 741-42. For the purposes of *Apprendi*, the two statutes are analytically identical. The only difference is that the latter statute poses the *Apprendi* issue in a more obvious way.

Balmer, J., joins in this dissent.

OPPOSITION BRIEF

No. 07-901

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF OREGON,

Petitioner,

vs.

THOMAS EUGENE ICE,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Oregon

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and again in *Blakely v. Washington*, 542 U.S. 296, 301 (2004), this Court declared that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Because *Oregon law* authorizes a sentencing court to increase the penalty for an offense by imposing a consecutive sentence *only after* the court finds facts additional to those established by the jury verdict, the Oregon Supreme Court held that respondent's sentences violated the *Apprendi* rule. *State v. Ice*, 343 Or. 248, 170 P.3d 1049, 1059 (2007). The State of Oregon has asked this court to grant its petition for a writ of certiorari to review that decision.

This Court should deny the petition because the federal question identified by the State lacks significance. A state appellate court has faced and conclusively decided the issue in only three jurisdictions. That number is unlikely to increase as the overwhelming majority of jurisdictions follow the common law rule that a sentencing court has unfettered discretion to impose consecutive sentences. Of the three jurisdictions that continue to face the issue, Oregon is the *lone* jurisdiction to hold that federal law requires jury factfinding prior to the imposition of consecutive sentences.

Moreover, an Oregon jury must make those findings in only the most limited of circumstances: *i.e.*, when a defendant proceeds by jury trial (which is less than 5% of misdemeanor and felony cases) *and* is found guilty of multiple offenses alleged to

have been committed on the same day, against the same victim. In all other circumstances, an Oregon court may impose consecutive sentences based either solely on the findings reflected in the jury verdict or on its own findings with a defendant's jury waiver. The practical significance of the question presented diminishes with each level of scrutiny.

Finally, not only does the State ask this Court to exercise discretion to decide an issue of trifling impact, it is actively asserting new arguments in the Oregon appellate courts that directly undermine its position before this Court. The State is arguing that the proper *statutory* interpretation of Oregon's consecutive sentencing provision, Or. Rev. Stat. § 137.123 (2007), allows for the imposition of consecutive sentences based only on legal determinations without additional factfinding. Thus, the State is asking the Oregon Supreme Court to reinterpret state law in a manner that would eliminate the federal issue altogether. Consequently, any decision from this Court on the issue would be both practically insignificant and premature.

ARGUMENT FOR DENYING A WRIT

The State of Oregon is the latest party to ask this Court to decide this sporting federal question of ever-diminishing significance: Does a statutory scheme that requires a sentencing court to engage in by-a-preponderance factfinding before imposing a consecutive sentence violate the *Apprendi* rule? As this Court has

concluded in similar cases,[1] there are no compelling reasons to grant a petition for a writ of certiorari to decide that issue.

A. THERE IS NO SIGNIFICANT CONFLICT – NOR WILL THERE BE – AMONG THE STATE COURTS OF LAST RESORT ON THE FEDERAL QUESTION PRESENTED

The State asserts that a vigorous dispute exists among eleven jurisdictions as to the application of the *Apprendi* rule to consecutive sentencing. It pits eight jurisdictions, which it claims "have concluded that the principles of *Apprendi* and *Blakely* do not apply to findings required for imposition of consecutive sentences," against a minority of three jurisdictions – including Oregon – that "have broadly construed *Apprendi* and *Blakely* to apply to the factual determinations necessary for imposition of consecutive sentences." Pet., pp. 16, 24, 37 n.7 (naming Alaska, California, Colorado, Illinois, Indiana, Maine, Minnesota, and Tennessee as comprising the former group and Ohio, Oregon, and Washington as the latter).

In fact, very few jurisdictions require a judge to engage in factfinding beyond the jury verdict for authority to impose consecutive sentences. That is no surprise because most states observe the common law norm granting sentencing judges complete discretion to order consecutive sentences. *See* ARTHUR W. CAMPBELL, LAW OF

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[1] *People v. Black*, 41 Cal. 4th 799, 161 P.3d 1130 (2007), *cert. den. sub nom. Black v. California*, ___ S. Ct. ___ (Jan. 14, 2008); *Alameda v. State*, 235 S.W.3d 218 (Tex. Crim. App.), *cert. den.*, 128 S. Ct. 629 (2007); *State v. Keene*, 2007 ME 84, 927 A.2d 398 (Me.), *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007); *Gould v. State*, 2006 WY 157, 151 P.3d 261 (2006), *cert. den. sub nom. Gould v. Wyoming*, 128 S. Ct. 125 (2007); *In re VanDelft*, 158 Wn. 2d 731, 147 P.3d 573 (2006), *cert. den. sub nom. Washington v. VanDelft*, 127 S. Ct. 2876 (2007); *People v. Lehnkuhl*, 117 P.3d 98 (Colo. App. 2004), *cert. den. sub nom. Lehnkuhl v. People*, 2005 WL 1864138 (Colo. 2005), *cert. den. sub nom. Lehnkuhl v. Colorado*, 546 U.S. 1109 (2006); *Smylie v. State*, 823 N.E.2d 679 (Ind.), *cert. den. sub nom. Smylie v. Indiana*, 546 U.S. 976 (2005); *People v. Wagener*, 196 Ill. 2d 269, 752 N.E.2d 430, *cert. den. sub nom. Wagener v. Illinois*, 534 U.S. 1011 (2001).

SENTENCING § 9:22, p. 425 (3d ed. 2004) ("Firmly rooted in common law is the principle that the selection of either concurrent or consecutive sentences rests within the discretion of sentencing judges."). Only three jurisdictions (Illinois, Maine, and Oregon) have passed legislation that countermands the common law rule and face the federal question presented.[1]

The State of Oregon overstates the extent of any conflict by including seven jurisdictions (California, Minnesota, Alaska, Indiana, Colorado, Ohio, and Washington) in which a sentencing court has authority to impose a consecutive sentence without additional factfinding. In those seven jurisdictions, there is no abrogation of the common law rule that gives judges discretion to order consecutive sentences merely on the basis of the jury verdict.

For example, the California Supreme Court interpreted its consecutive sentencing statute as not altering a sentencing court's plenary authority under common law to impose consecutive sentences when a defendant is convicted of multiple offenses:

> California's statute does not establish a presumption in favor of concurrent sentences; its requirement that concurrent sentences be imposed if the court does not specify how the terms must run merely provides for a default in the event the court fails to exercise its discretion.

[1] Tennessee intermediate appellate courts' recently-issued and as-yet unpublished decisions holding the *Apprendi* rule inapplicable to consecutive sentences are currently pending before the Tennessee Supreme Court. *State v. Davis*, 2007 WL 2051446 (Tenn. Crim. App. July 19, 2007), *perm. to appeal granted* (Tenn. Dec. 17, 2007); *State v. Allen*, 2007 WL 1836175 (Tenn. Crim. App. June 25, 2007), *perm. to appeal granted* (Tenn. Oct. 15, 2007). Another recent decision (and the one most extensively quoted by the State) gratuitously addressed the issue *sua sponte*. *State v. Higgins*, 2007 WL 2792938, at *11 (Tenn. Crim. App. Sept. 27, 2007). The other cited Tennessee authorities are of questionable pedigree, as they predate this Court's rejection of the Tennessee Supreme Court's determination that its sentencing scheme did not violate the *Apprendi* rule. *Gomez v. Tennessee*, 127 S. Ct. 1209 (2007), *on remand sub nom. State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).

People v. Black, 161 P.3d at 1145 (interpreting CAL. PENAL CODE § 669 (West 1999)). As the State concedes, the *Apprendi* rule is inapplicable when a judge imposes consecutive sentences as punishment within the applicable statutory range. Pet., pp. 16 n.3, 37.

Similarly, and contrary to the State's claims, Minnesota does not require a judge to find additional facts to impose a consecutive sentence. The State accurately reports that a defendant convicted of multiple offenses in Minnesota presumptively receives concurrent sentences. Pet., p. 22. The State fails to acknowledge, however, that the statutory exceptions to that presumption allow a judge to impose consecutive sentences without finding any facts beyond those established by the jury verdict.

Under Minnesota law, a judge may impose consecutive sentences when the judge "finds" that a defendant has been convicted of multiple "crimes against persons." *See State v. Senske*, 692 N.W.2d 743, 746 (Minn. App.) (citing Minn. Sent. Guidelines II.F.1., 2.), *review denied* (Minn. May 17, 2005). The State cites an intermediate appellate court's conclusion in *Senske* that the "finding" does not violate the *Apprendi* rule. Pet., p. 22. The reason, however, that the "finding" does not implicate the *Apprendi* rule is that, under Minnesota law, a judge can determine whether a defendant has been convicted of multiple "crimes against persons" without finding additional facts not already established by the jury verdict.

In *Senske*, the defendant pleaded guilty to two violations of sexual penetration of a child under the age of 16. 692 N.W.2d at 745 (citing MINN. STAT. § 609.342, subd. (1)(g) (2002)). The judge determined that the defendant committed multiple

"crimes against persons" merely by noting that the jury had returned guilty verdicts on allegations that the defendant had repeatedly sexually penetrated a child. Such a determination comports with the *Apprendi* rule because it does not require a judge to find any fact beyond those established by the jury verdict.

Alaska's sentencing scheme falls into the same category as California's and Minnesota's. An Alaska judge has complete discretion to impose consecutive sentences without additional legislatively-required factfinding. ALASKA STAT. § 12.55.127 (2006); *see also Vandergriff v. State*, 125 P.3d 360, 362 (Alaska Ct. App. 2005) (citing for same proposition ALASKA STAT. § 12.55.025(e), (g) (2003) (repealed 2004)). To promote the legislature's mandate to eliminate disparity in sentencing and to enable appellate review, the Alaska Supreme Court announced "a common-law sentencing rule" that a judge must state that consecutive sentences are "necessary to protect the public" if the sentences' aggregate length exceeds the maximum sentence for the most serious offense. *Vandergriff*, 125 P.3d at 362.

The Alaska Court of Appeals concluded that that *judicially*-created guide to the exercise of sentencing discretion

> does not increase the potential sentence a defendant may receive beyond the statutory range of potential sentences *already specified by the legislature*. Instead, the rule announces that trial judges operating within the range of potential penalties *specified by the legislature* should exercise their discretion to impose consecutive sentencing beyond the maximum penalty for the most serious offense only after a careful examination of the sentencing criteria.

125 P.3d at 363 (emphases added). Thus, as a matter of Alaska law, consecutive sentencing is within the statutory range of punishment that a judge may impose based solely on the jury verdict.

The same is true under Indiana's former and current consecutive sentencing schemes. The former scheme provided only that "aggravating and mitigating circumstances *may* be a consideration in imposing concurrent or consecutive sentences." *Smylie v. State*, 823 N.E.2d at 686 n.8 (citing IND. CODE ANN. § 35-50-1-2 (West 2004)) (emphasis added)). As in Alaska, the Indiana Supreme Court had announced a *judicial* policy that sentencing judges should note an aggravating factor or circumstance when choosing to impose a consecutive sentence. *Id* (citing authorities). When considering that *judicial* policy, however, the Indiana Supreme Court affirmed that a judge's authority to impose consecutive sentences arose solely from the jury verdict:

> [O]ur statutes do not erect any target or presumption concerning concurrent or consecutive sentences. Where the criminal law leaves sentencing to the *unguided discretion of the judge* there is no "judicial impingement of upon the traditional role of the jury."

823 N.E.2d at 686 (quoting *Blakely*, 542 U.S. at 309) (emphasis added); *see also, e.g., Mott v. State*, 273 Ind. 216, 402 N.E.2d 986, 988 (1980) ("The court may, upon consideration of relevant facts and information, . . . impose consecutive sentences . . . . The determination of whether sentences are to be served concurrently or consecutively is within the discretion of the trial court . . . ." (citation omitted)).

Moreover, the Indiana legislature amended its sentencing scheme in 2005 to incorporate "advisory" sentences. *State v. Howell*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006) (citing IND. CODE ANN. §§ 35-38-1-7.1, 35-50-2-1.3 (West 2005)). An Indiana trial court may now impose any statutorily authorized sentence that is permissible under the state constitution "regardless of the presence or absence of

aggravating circumstances or mitigating circumstances." IND. CODE ANN. § 35-38-1-7.1(d)(1) (LexisNexis Supp. 2007). Thus, Indiana is not properly considered part of a "significant split among the state courts." Pet., p. 14.

The State also cites inapposite cases from Colorado. Pet., p. 23-24 (citing *People v. Lehmkuhl*, 117 P.3d 98 and *People v. Clifton*, 69 P.3d 81 (Colo. App. 2001), *reaff'd in part*, 74 P.3d 519 (Colo. App. 2003)). In each of those cases, the defendants unsuccessfully argued that the sentencing courts violated the *Apprendi* rule when the judges imposed mandatory consecutive sentences after finding that the crimes arose from the same incident. *Clifton*, 69 P.3d at 83-86; *see also Lehmkuhl*, 117 P.3d at 106-08 (addressing same argument post-*Blakely*). Colorado law, however, gave the sentencing courts authority to impose consecutive sentences without the challenged factfinding.

Colorado law *requires* that a judge impose consecutive sentences when a defendant commits more than one "crime of violence" arising out of the same incident. *Clifton*, 69 P.3d at 84 (quoting COLO. REV. STAT. § 16-11-309(1)(a) (2001)); *see also Lehmkuhl*, 117 P.3d at 106 (citing COLO. REV. STAT. § 18-1.3-406(1)(a) (2004)). In each case, although the jury verdict established that the defendant committed multiple "crimes of violence," the verdict did not establish (as the judge found) that the offenses arose out of the *same* incident. *Lehmkuhl*, 117 P.3d at 107; *Clifton*, 69 P.3d at 84. Colorado judges *always* have discretion to impose consecutive sentences, however, for offenses arising out of *separate* incidents. *Juhl v. People*, 172 P.3d 896, 899 (Colo. 2007); *Clifton*, 69 P.3d at 84.

In other words, the Colorado judges did not impose punishments that *exceeded* the ranges of punishment authorized solely by the jury verdicts. The consecutive sentences were essentially *mandatory minimum sentences*. That type of factfinding does not implicate the *Apprendi* rule because it requires that the sentencing court impose some *minimum punishment within the otherwise authorized range*. *Blakely*, 542 U.S. at 304-05 (citing plurality opinion in *Harris v. United States*, 536 U.S. 545, 567, (2002) ("Within the range authorized by the jury's verdict, however, the political system may channel judicial discretion – and rely upon judicial expertise – by requiring defendants to serve minimum terms after judges make certain factual findings.")).

Finally, the State also erroneously includes Ohio and Washington as jurisdictions that would benefit from this Court's intervention in this case. In those jurisdictions, however, judges may now impose consecutive sentences without implicating the *Apprendi* rule due to changes in the sentencing schemes. Those state law amendments take those jurisdictions out of the reach of any decision from this Court on the federal question presented.

The Ohio Supreme Court annulled any statutory requirement that a trial court engage in factfinding before imposing consecutive sentences. *Ohio v. Foster*, 845 N.E.2d 470, 497, 109 Ohio St. 3d 1, 2006 Ohio 856 (following remedy applied in *United States v. Booker*, 543 U.S. 220 (2005)), *cert. den. sub nom. Foster v. Ohio*, 127 S. Ct. 442 (2006). Accordingly, Ohio judges now have absolute discretion to impose consecutive sentences without any additional factfinding. It is of little consequence that the Ohio Supreme Court eliminated those requirements based on its conclusion that consecutive sentencing implicated the *Apprendi* rule. The fact remains that, as

a matter of current Ohio state law, a judge need not engage in any independent factfinding to impose consecutive sentences.

Similarly, the Washington legislature has effectively reduced the matter to an issue of state law through its recent enactments. Previously, the Washington Supreme Court concluded that this Court's decision in *Blakely* applied to a narrow class of consecutive sentences because those consecutive sentences were also "exceptional sentences." *In re VanDelft*, 147 P.3d at 578-79; *see also Blakely*, 542 U.S. at 303-05 (sentencing court could not impose "exceptional sentence" based on judicially-found aggravating factor). In response to *Blakely*, however, the Washington legislature revised the sentencing scheme to require a jury to find beyond a reasonable doubt the aggravating factors to support any "exceptional sentence" – including that subset of consecutive sentences addressed in *VanDelft*. WASH. REV. CODE ANN. § 9.94A.535 (West Supp. 2008); WASH. REV. CODE ANN. § 9.94A.537 (West Supp. 2008); WASH. REV. CODE ANN. § 9.94A.589(1)(a) (West 2003). Therefore, a decision from this Court on the question presented would not have any effect in Washington, where the issue is now squarely addressed by state law.

In the aforementioned seven jurisdictions, the *Apprendi* rule is inapplicable to consecutive sentencing because either (1) the state appellate courts have interpreted state law to allow for consecutive sentencing based solely on the facts established by the jury verdict or (2) the state legislatures have amended their sentencing schemes to that effect. This Court is bound to accept those resolutions of the matter as conclusive determinations on state law grounds. *See Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) ("We are, of course, bound

to accept the interpretation of [a state's] law by the highest court of the State."). Consequently, those jurisdictions do not face the federal question presented.

When properly accounting for the application of state law, the State identifies a dispute among a mere three jurisdictions (Illinois, Maine, and Oregon). Of those three jurisdictions, *only* Oregon requires the jury to find facts for consecutive sentencing beyond a reasonable doubt. *Ice*, 170 P.3d 1059. In other words, factual issues related to consecutive sentencing are being submitted to a jury rather than a judge as a matter of *federal* law in only one jurisdiction. Furthermore, a survey of all the other state jurisdictions reveals that Oregon will remain a *rara avis*.[1] A

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[1] The jurisdictions that the State does not include in the division fall into two categories:

Thirty-five jurisdictions have either codified the common law rule or confirmed its continuing force in case law: Alabama, see ALA. CODE § 14-4-9(a) (LexisNexis 1995); Arizona, see ARIZ. REV. STAT. § 13-708 (Supp. 2007); Arkansas, see ARK. CODE ANN. § 5-4-403 (Michie 2006); Connecticut, see CONN. GEN. STAT. ANN. § 53a-37 (West 2007); Florida, see FLA. STAT. ANN. § 921.16 (West Supp. 2007); Georgia, see GA. CODE ANN. § 17-10-10 (2004); Hawaii, see HAW. REV. STAT. § 706-668.5 (1993); Idaho, see IDAHO CODE § 18-308 (Michie 2004); Iowa, see IOWA CODE § 901.8 (2003); Kansas, see KAN. STAT. ANN. § 21-4608 (1995); Kentucky, see KY. REV. STAT. ANN. § 532.110(1) (LexisNexis Supp. 2007); Louisiana, see LA. CODE CRIM. PROC. ANN. Art. 883 (1997); Maryland, see *State v. Parker*, 334 Md. 576, 640 A.2d 1104, 1112 (1994); Massachusetts, see *Commonwealth v. Lykus*, 406 Mass. 135, 546 N.E.2d 159, 166 (1989); Mississippi, see MISS. CODE ANN. § 99-19-21 (2007); Missouri, see MO. ANN. STAT. § 558.026 (West 1999); Montana, see MONT. CODE ANN. § 46-18-401(4) (2007); Nevada, see NEV. REV. STAT. 176.035 (2007); New Hampshire, see *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 919 A.2d 767, 771-73 (2007); New Jersey, see N.J. STAT. ANN. § 2C:44-5 (West 2005); New Mexico, see *State v. Padilla*, 85 N.M. 140, 509 P.2d 1335, 1338 (1973); North Carolina, see N.C. GEN. STAT. § 15A-1354 (2005); North Dakota, see N.D. CENT. CODE § 12.1-32-11(1) (1997); Oklahoma, see OKLA. STAT. ANN. tit. 22, § 976 (West 2003); Pennsylvania, see *Commonwealth v. Rickabaugh*, 706 A.2d 826, 847 (Pa. Super. Ct. 1997); Rhode Island, see R.I. GEN. LAWS § 12-19-5 (2002); South Carolina, see *Treece v. State*, 365 S.C. 134, 616 S.E.2d 424, 425 (2005); South Dakota, see S.D. CODIFIED LAWS § 22-6-6.1 (Supp. 2003); Texas, see TEX. CODE CRIM. PROC. ANN. Art. 42.08 (Vernon 2006); Utah, see UTAH CODE ANN. § 76-3-401 (2003); Vermont, see VT. STAT. ANN. tit. 13, § 7032 (1998); Virginia, see VA. CODE ANN. § 19.2-308 (2004); West Virginia, see W. VA. CODE ANN. § 61-11-21 (LexisNexis 2005); Wisconsin, see WIS. STAT. ANN. § 973.15 (West 2007); and Wyoming, see *Tilley v. State*, 912 P.2d 1140, 1142 (Wyo. 1996).

Four jurisdictions dictate the imposition of consecutive or concurrent sentencing based on the verdict alone, without resorting to any additional factfinding: Delaware, see DEL. CODE ANN. tit. 11, § 3901(d) (2001) (authorizing only consecutive sentences); Michigan, see *People v. Brown*, 220 Mich. App. 680, 560 N.W.2d 80, 81 (1996) (authorizing only concurrent sentences absent specific authorization by statute); see *also* MICH. COMP. LAWS ANN. § 768.7b (West 2000) (authorizing consecutive sentences if defendant charged with a felony, pending disposition, commits another felony); MICH. COMP. LAWS ANN. § 333.7401 (West Supp. 2007) (authorizing consecutive sentences if defendant is convicted of a drug offense and another felony); Nebraska, see *State v. Nelson*, 235 Neb.

decision to settle any disagreement on the question presented among the three relevant jurisdictions would amount to an extravagant expenditure of this Court's resources for little practical impact.

B. EVEN IN OREGON, THE DECISION BELOW IS ALMOST INCONSEQUENTIAL TO CONSECUTIVE SENTENCING.

The State complains that "Oregon judges have now lost their traditional role in [the] critical area" of consecutive sentencing. Pet., p. 36. That observation is either a misunderstanding or careless overstatement of the effect and scope of the decision below. The decision below has no application to the vast majority of Oregon prosecutions that result in multiple convictions. And even in the rare case that falls under the decision, the judge's traditional authority to decide whether circumstances justify imposition of a consecutive sentence remains unadulterated.

The State fails to note the paucity of case types in which Oregon prosecutors seeking consecutive sentences will "suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of [the defendant's] equals and neighbours.'" *See Blakely*, 542 U.S. at 313 (quoting 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)). Due to post-*Blakely* enactments by the Oregon Legislature and the particularities of the consecutive sentencing provision, the class

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15, 453 N.W.2d 454, 460 (1990) (approving of common law rule generally, but presuming concurrent sentences for crimes arising out of same transaction unless "offense charged in one count involved any different elements than an offense charged in another count"), and New York, see N.Y. PENAL LAW § 70.25 (McKinney Supp. 2008) (codifying common law rule with exception of mandatory concurrent sentences for "offenses committed through single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other"); *see also People v. Azar*, 41 A.D.3d 610, 611-12, 837 N.Y.S.2d 339 (N.Y. App. Div.) (separate and distinct act determination presents legal question based on facts already found by the jury), *appeal denied*, 9 N.Y.3d 920, 875 N.E.2d 894, 844 N.Y.S.2d 175 (2007); *People v. Grach*, 40 A.D. 3d 1368, 1375, 838 N.Y.S.2d 207 (N.Y. App. Div.) (same), *appeal denied*, 9 N.Y.3d 923, 875 N.E.2d 897, 844 N.Y.S.2d 178 (2007)

of cases in which consecutive sentencing facts must be submitted to a jury is exceedingly small. The decision below will not have any application to cases in which a defendant: pleads guilty or no contest; waives the right to a jury trial in the guilt or sentencing phases; is convicted of only one offense; is convicted of offenses that occurred on different days; or is convicted of offenses against different victims.

In response to *Blakely*, the 2005 Oregon legislature enacted statutory provisions governing the proof of facts in criminal trials that implicate the *Apprendi* rule. 2005 Or. Laws, ch. 463 (codified at Or. Rev. Stat. §§ 136.760–.792 (2007)). Those provisions apply to "enhancement facts," *i.e.*, "[a] fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime." OR. REV. STAT. § 136.760(2).[1] Now, a defendant who waives the right to have a jury determine guilt or innocence also waives the right to a jury trial on all enhancement facts. OR. REV. STAT. § 136.776. Thus, the prosecution will not be called upon to prove consecutive sentencing facts to a jury in any case in which the defendant waives jury rights. Unsurprisingly, the Oregon Judicial Department's statistics demonstrate that the portion of criminal cases that proceed to a jury trial comprises *less than 5% of felony and misdemeanor cases*. OFFICE OF THE STATE COURT ADM'R, SUP. CT. OF OR., STATISTICAL REPORT RELATING TO THE CIRCUIT

[1] In doing so, the legislature demonstrated an adroit ability to respond to sentencing developments that flow from *Apprendi*. A future legislative response could revert Oregon's consecutive sentencing scheme to the common law norm that predated the 1987 enactment of Or. Rev. Stat. § 137.123. *See State v. Jones*, 250 Or. 59, 440 P.2d 371, 372 (1968) ("It is an inherent power of the court to impose sentences, including the choice of concurrent or consecutive terms when the occasion demands it. Accordingly, the legislature would have recognized that no legislation was needed to authorize the courts to exercise a power already in existence to impose either consecutive or concurrent sentences." (citation omitted)). Such an amendment would eliminate the question presented in Oregon altogether.

COURTS OF THE STATE OF OREGON: FIRST HALF 2007, tbl. 6, at 83 (2007), *accessible at* http://www.ojd.state.or.us/osca/2007Statistics.htm.

The small number of affected Oregon cases is further reduced, because Oregon law authorizes a sentencing court to impose consecutive sentences without additional factfinding when multiple offenses did not arise "from the same continuous and uninterrupted conduct." OR. REV. STAT. § 137.123(2). Thus, when a jury returns guilty verdicts for offenses alleged to have occurred on different dates, a trial court would have authority to impose consecutive sentences, because the requisite factual determination is inherent in the jury verdict. *Cf. Ice*, 170 P.3 at 1059 n.7 (choosing not to analyze the case that way "given that the indictment did not specify particular dates or otherwise distinguish between" the counts). Similarly, a sentencing court could impose consecutive sentences after determining, based solely on the jury verdict, that the offenses harmed, or risked harming, different victims. OR. REV. STAT. § 137.123(5)(b).

Accordingly, the decision below requires jury findings for a consecutive sentence *only when* a defendant exercises the right to a jury trial throughout the prosecution *and* a jury returns guilty verdicts on more than one criminal offense *and* the offenses occurred on the same date *and* the offenses injured the same victim. It would be unwarranted to grant the State's petition to decide whether the Constitution requires a jury finding on consecutive sentencing facts in those extremely limited circumstances for the benefit of a single jurisdiction.

Finally, even in the narrow circumstances where the decision below will require additional jury factfinding, that requirement will not undermine an Oregon

judge's ultimate determination as to whether a consecutive sentence is "warranted" for a specific offense to "impose meaningful punishment for each separate conviction." Pet., p. 35. When a consecutive sentence for an offense is authorized by the jury, the sentencing judge retains the ultimate *discretion* to impose a concurrent or consecutive sentence. OR. REV. STAT. § 137.123(1), (2), (4), and (5) (each providing that the trial court "may" impose a consecutive or concurrent sentence upon satisfaction of factual predicate); *see also Callahan v. United States*, 364 U.S. 587, 597 (1961) ("It was therefore within the discretion of the trial judge to fix [consecutive] sentences, *even though Congress has seen fit to authorize for each of these two offenses what may seem to some to be harsh punishment*." (emphasis added)). Only now, the facts authorizing the greater punishment for that offense must be found by a jury beyond a reasonable doubt. *Ice*, 170 P.3d at 1059.

As a matter of Oregon law, though, an aspect of punishment *for a single offense* is whether a sentence for that offense is consecutive to or concurrent with another sentence. *See* OR. REV. STAT. § 137.123(5)(a) (authorizing consecutive sentence for a "criminal offense"). The decision below merely stays true to this Court's admonition that a jury – and not a judge – must find every fact beyond a reasonable doubt "which the law makes essential to the punishment" for an offense. *Blakely*, 542 U.S. at 304 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872)).

C. THIS CASE IS NOT A GOOD VEHICLE TO RESOLVE THE QUESTION PRESENTED BECAUSE THE STATE OF OREGON CONTINUES TO CAST DOUBT AS TO THE PROPER INTERPRETATION OF OR. REV. STAT. § 137.123.

Finally, this case is not a good vehicle to decide the question presented because the statutory interpretation of Or. Rev. Stat. § 137.123 remains unsettled – *at the State's behest*. This Court will not decide a case if a change in law eliminates the significance of the federal issue that the case purportedly presents. *Cook v. Hudson*, 429 U.S. 165 (1976). Indeed, if a case will not "reach to a problem beyond the academic or the episodic," this Court avoids deciding federal constitutional questions. *Rice v. Sioux City Cemetery*, 349 US 70, 74 (1955). The cloud over Or. Rev. Stat. § 137.123 is ironically cast by the State of Oregon – the very party asking for a writ of certiorari in this case – which is actively litigating statutory issues that question the interpretation that was relied on below to reach the federal issue. *See, e.g.*, Resp. to Pet. for Review, *State v. Hagberg*, S054997 (Nov. 29, 2007), *review allowed*, ___ Or. ___, ___ P.3d ___ (Jan. 16, 2008).[5]

No Oregon appellate opinion has addressed the State's new statutory arguments, and the State failed to raise them below in this case. The Oregon appellate courts could issue decisions in pending cases that alter the interpretation of the consecutive sentencing statute. That, in turn, could change, further reduce, or entirely eliminate the federal question identified by the State in its petition. The

[5] *See also* Resp't's Resp. to Appellant's Pet. for Recons., *State v. Miller*, ___ Or. App. ___, ___ P.3d ___ (Jan. 30, 2008) (A126149), *modifying on recons.*, 214 Or. App. 494, 166 P.3d 591 (2007); Resp't's Supplemental Mem., *State v. Lotton*, A132948 (Or. Ct. App. Nov. 21, 2007); Resp't's Supplemental Mem., *State v. Nguyen*, A127563 (Or. Ct. App. Nov. 21, 2007); Resp't's Supplemental Br., *State v. Agee*, A128672 (Or. Ct. App. Jan. 16, 2008).

import of this case will be *de minimus*, or nonexistent, if the State prevails on its new statutory arguments.

The decision below is the first published opinion in which the Oregon Supreme Court addressed whether Or. Rev. Stat. § 137.123 requires additional factfinding before a sentencing judge could impose consecutive sentences for offenses that occurred during the same range of dates. First, the majority held that a determination as to whether the offenses arose out of the same criminal episode required additional factfinding beyond the jury verdict. *Ice*, 170 P.3d at 1059 & n.7 (discussing OR. REV. STAT. § 137.123(2)). Second, the court held that, if offenses arose out of the same conduct, the sentencing court must impose concurrent sentences unless the judge "finds one of two facts" set out in Or. Rev. Stat. § 137.123(5)(a) and (b). *Ice*, 170 P.3d at 1053, 1056-57; *see also id.* 170 P.3d at 1060 (Kistler, J., dissenting) (interpreting statute in same manner). The majority held that the required factfinding implicated the *Apprendi* rule. *Id.* at 1059. It is of note that the sections of the majority and dissenting opinions that interpret the statute do not contain a single case citation. *Ice*, 170 P.3d at 1053, 1056-57, 1060.

In numerous pending direct appeals, the State advocates for an interpretation of Or. Rev. Stat. § 137.123 at odds with the decision below. In cases before both of the Oregon appellate courts, the State now argues that subsections (2), (5)(a), and (5)(b) of Or. Rev. Stat. § 137.123 each allow for multiple alternative determinations of law, rather than findings of fact. The State contends that, when the statute is properly interpreted, the imposition of consecutive sentences will rarely if ever implicate the *Apprendi* rule.

At *the State's* request, the Oregon Supreme Court recently allowed the defendant's petition for review in *Hagberg* to entertain arguments that Or. Rev. Stat. § 137.123 contemplates the imposition of consecutive sentences as a matter of law without additional factfinding. Press Release, Oregon Supreme Court (Jan. 23, 2008).[1] As having occurred below in this case, when the defendant in *Hagberg* was convicted of multiple sexual offenses against the same victim during the same range of dates, the sentencing court imposed a consecutive sentence after finding that the offenses arose out of different criminal episodes. Press Release (citing OR. REV. STAT. § 137.123(2)). In *Hagberg*, however, the sentencing court was of the opinion that that finding was reflected in the jury verdict because the jury had been instructed to find that each count was "separate and distinct." Press Release. After the Oregon Supreme Court released the decision below,

> *the state* requested that the Oregon Supreme Court grant defendant's petition for review, limited to the consecutive sentencing issue. The state asked this court to affirm the Oregon Court of Appeals, which upheld the trial court's imposition of a consecutive sentence, *on a basis that was not considered or decided in* State v. Ice. *Specifically, the state asked this court to "explore whether and under what circumstances a court may impose a consecutive sentence pursuant to Or. Rev. Stat. § 137.123 based solely on those facts necessarily established by the verdict or guilty plea* – i.e., *without undertaking any additional factfinding.*"

Press Release (emphases added).

As noted, the Oregon Supreme Court allowed the petition for review in *Hagberg* and the parties are currently briefing the case. *Id.* Although the State has

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[1] The Oregon Supreme Court press release is accessible on the Internet. http://www.ojd.state.or.us/mediareleases (follow "view" -- All News Releases --"; then follow "Supreme Court Media Releases – January 23, 2008 – Supreme Court Conference summary")

not yet filed its brief to defend the sentencing court's determination that Or. Rev. Stat. § 137.123(2) does not require additional factfinding, it is certainly on record in other pending appeals contesting the conclusion below that Or. Rev. Stat. § 137.123(5)(a) and (b) each require additional factfinding.

The State now argues that Or. Rev. Stat. § 137.123(5)(a) contains three separate inquiries, the first being a purely legal question for the judge:

> Properly construed, Or. Rev. Stat. § 137.123(5)(a) prescribes a three-step process when a court wants to impose consecutive sentences on separate convictions entered in a single sentencing proceeding:
>
> First, the court has unlimited discretion to impose consecutive sentences on the convictions if they are based on crimes that are equally "serious."
>
> Second, if the crimes are not equally serious, the court may impose a consecutive sentence on the conviction for a lesser offense if that offense was not, in fact, "incidental" to the defendant's commission of the greater offense.
>
> And third, if the conviction is for a lesser offense that was incidental to the greater offense, the court may impose a consecutive sentence on the lesser offense only if that offense was not "merely incidental" to the greater crime "but rather" demonstrated the defendant's willingness to commit more than one criminal offense.
>
> . . . .
>
> Therefore, based solely on the nature and relative rankings of the convictions entered – *i.e.* without any further factfinding that would be subject to *Blakely* – the sentencing court [in this case] had authority under Or. Rev. Stat. § 137.123(5)(a) to impose consecutive sentences on defendant's two convictions because, a matter of law, neither is "more serious" than the other.

Resp't's Supplemental Mem. at 15-17, *Loftin*, A132948.

The State also argues that Or. Rev. Stat. § 137.123(5)(b) contains two inquiries that present only legal determinations in almost all circumstances.

According to the State, that subsection requires the court to make two determinations: (1) whether the two crimes involved a different victim; and (2) even if they involved the same victim, whether they "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim." *Id.* at 18. Moreover, the State argues that "different harms" *legally* result from the violation of different criminal statutes:

> The question is thus presented whether the "greater or qualitatively different" determination under subsection (5)(b) is one that necessarily requires factfinding beyond the nature of the convictions themselves, in which case *Blakely* and *Ice* may require the issue to be decided by the jury. Although there may be some cases at the margin, in many cases a court will be able to find *as a matter of law* without any additional factfinding – that the injuries that the defendant inflicted on the victim by two separate crimes of conviction were "greater or qualitatively different."

Id. (emphasis in original).

Contrary to the basis of the decision below that each subsection of Or. Rev. Stat. § 137.123(5) call for at least one factual inquiry, the State now argues that each subsection contains multiple inquiries. The State further argues that most of those inquiries are legal questions for the trial court that do not implicate the *Apprendi* rule. A jury would need to make consecutive sentencing findings under subsection (5)(b) only when the defendant is convicted of multiple violations of the *same* criminal statute against the *same* victim during the *same* criminal episode. Keeping in mind the State's position that a jury need not make additional findings to authorize consecutive sentences when the offenses are equally serious (pursuant to subsection (5)(a)), it is hard to imagine an instance when jury findings would be required at all. If the State's new position proves correct, the Oregon Supreme

Court erroneously interpreted Or. Rev. Stat. § 137.123 in this case, and it may have reached the federal question unnecessarily.

This Court has no assurances that the State's new statutory arguments will not prevail. The Oregon Supreme Court conducted only a cursory statutory interpretation below. The litigation focused primarily on the constitutional issues. Thus, when presented with the State's new arguments, the Oregon Supreme Court could be persuaded that it misinterpreted Or. Rev. Stat. § 137.123 below. At a minimum, the State's most recent arguments presage renewed litigation over the meaning of Or. Rev. Stat. § 137.123. The unsettled meaning of Or. Rev. Stat. § 137.123 renders this case a poor vehicle to decide the federal question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

February 5, 2008

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REPLY BRIEF

86

(3)

FILED

FEB 15 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-901

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

REPLY BRIEF

Petition for Writ of Certiorari to the Oregon Supreme Court

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REPLY BRIEF

Petitioner, the State of Oregon, asks this Court to review the Oregon Supreme Court's holding that the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), applies not only to sentences imposed for individual convictions, but also to findings required under state law for the imposition of consecutive sentences. The State urges review because state courts are deeply divided over this issue and because the Oregon Supreme Court's holding is an unwarranted extension of *Apprendi* and *Blakely* beyond what this Court's reasoning and holdings support.

In opposition, respondent contends that the state-court split on the question presented is not as great as the State asserted in the petition. Respondent also downplays the significance of the Oregon Supreme Court's holding, characterizing the impact as "inconsequential" and "trivial" and focusing on the possibility that the State may be able to limit the impact in some cases or that the Oregon Legislative Assembly may respond to the court's ruling. Respondent's labored efforts to minimize the extent of the split and the impact of the Oregon Supreme Court's decision are unavailing. Moreover, respondent largely ignores the importance of the federal constitutional question presented in the petition. None of respondent's reasons for denying the petition should prove persuasive.

A. Respondent is alone in contending that a significant split does not exist on this recurring issue of federal constitutional law.

Respondent maintains that the split among state courts is not as large as the 7-to-3 split the State described in its petition. Br. in Opp. 3-10. According to respondent's assessment of the state caselaw, only a 2-to-1 split exists, with the Maine Supreme Court and Illinois Supreme Court reaching a conclusion opposite to that reached by the Oregon Supreme Court. Br. in Opp. 9. Respondent stands alone in taking such a restrictive view of the extent of the split.

Both the majority and dissent for the Oregon Supreme Court in this case fully recognized that the majority's decision conflicted with the weight of authority from numerous other jurisdictions that have resolved this issue. The majority "acknowledge[d] that most other courts that have considered this question have reached a different conclusion" than the decision that it reached. Pet. App. 30 (discussing holdings in Washington, California and Illinois). The dissent similarly explained that "[a]lmost every court that has considered this question has held that *Apprendi* does not apply in this context," that the majority's decision is "out of line with the clear weight of authority," that "[t]here is a split among states that have considered this recurring issue of federal law," and that "the majority's decision deepens and confirms" the split. Pet. App. 33, 43-45 (describing Colorado, Illinois, Indiana, Iowa, Louisiana, Maine, Minnesota, New Jersey, and Tennessee as resolving the issue

contrary to the majority's holding, and describing Ohio and Washington as agreeing with that holding).

Other courts also have recognized a much broader split than respondent is willing to acknowledge. Prior to the Oregon decision, the Maine Supreme Court described the split as 9-to-1 (or 9-to-2 depending on whether Washington was included in light of the conflicting opinions from that state). *State v. Keene*, 2007 Me 84, 927 A.2d 398, *cert. den. sub nom. Keene v. Maine*, 128 S. Ct. 490 (2007). That court described Alaska, Florida, Hawaii, Iowa, Kansas, Massachusetts, New Hampshire, and New York as adopting the same view that Maine did—"that *Apprendi* and its successors are limited to sentences for individual crimes, and *Apprendi* does not apply to judicial determinations regarding the sequence in which discreet sentences for multiple crimes are to be served." *Keene*, 927 A.2d at 407. Adding Oregon to the list, the split—from the perspective of the Maine Supreme Court—would be 9-to-2 (or 9-to-3).

Moreover, when the Washington Supreme Court held that "consecutive sentencing decisions do not trigger the concerns identified in *Apprendi*," it noted that its "holding [was] in line with the position taken in most other jurisdictions"—including Alaska, California, Colorado, Illinois, Indiana, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New Hampshire, and Tennessee—"that have faced this issue." *State v. Cubias*, 155 Wn. 2d 549, 555, 120 P.3d 929, 932 (2005). Thus, the *Cubias* court would view the split as 13-to-2, after Ohio and Oregon addressed the question.

Finally, the Hawaii Supreme Court has listed jurisdictions that "have aphoristically dismissed the proposition that either *Blakely* or *Apprendi* proscribes consecutive term sentencing" as including Alaska, Florida, Illinois, Minnesota, New Hampshire, New Jersey, and New York (along with Ohio, prior to that state's change in direction, and Washington). *State v. Kahapea*, 111 Haw. 267, 279-80, 141 P.3d 440, 452-53, *recons. den.*, 111 Haw. 316, 141 P.3d 489 (2006). With the changes in Ohio, Washington, and Oregon, the Hawaii court would consider the split to be 8-to-3.

The State is aware of no state appellate court that has taken as restrictive a view of the split as respondent takes, with the possible exception of Ohio (which labored under the misconception that its requirement for findings for consecutive sentences was unique and which predated some of the more significant decisions, *see* Pet. 25). The differences between the State's assessment of the extent of the split and respondent's can largely be explained by four considerations, none of which minimizes the nationwide significance of the question presented. First, respondent simply disregards states—Ohio and Washington, most notably—in which the legislative branch or judicial branch took steps to remedy the perceived constitutional violation at issue in this case. Br. in Opp. 8-9. Respondent has it backwards. That the Ohio Supreme Court annulled a legislatively-enacted policy and that the Washington legislature appears to have amended its consecutive-sentencing procedure based on what may be an incorrect reading of this Court's *Apprendi* and *Blakely* decisions is a prime reason why

review is warranted. This Court's review will clarify whether the federal constitution displaces the states' traditional authority to legislate in this area and mandates this kind of modification of legislative policy choices. In determining the extent of the split, the key point is that both Ohio and Washington had required findings to impose consecutive sentences and that appellate courts in both states issued holdings on the precise federal constitutional issue raised here. Those holdings squarely place Ohio and Washington in the category of states that have struggled with this recurring issue.

Somewhat similarly, respondent attempts to remove Indiana from consideration because that state amended its sentencing scheme in 2005 to ensure compliance with *Blakely*, by making sentences for individual offenses merely advisory. Br. in Opp. 6-7. But that amendment does not appear to have nullified the judicially-imposed requirement that a trial court must find at least one aggravating circumstance to impose a consecutive sentence. *See Page v. State*, 878 N.E. 2d 404 (Ind. App. 2007) (identifying requirement in post-amendment case). And the Indiana court clearly addressed the question presented in the petition in a manner contrary to the Oregon Supreme Court's holding. Pet. 20-21.

Second, respondent focuses on possible alternate bases for various state appellate court holdings while ignoring clear statements by those courts about how they construe the scope of *Apprendi* and *Blakely*. For example, respondent maintains that this Court should disregard the analysis of the Minnesota and

Colorado courts on this question because, according to respondent's construction of those states' laws, consecutive sentences were authorized without factfinding, thus rendering the courts' statements on this question unnecessary. Br. in Opp. 4-5, 7-8. Respondent's arguments appear to conflict with how the Minnesota and Colorado courts have construed their own state statutes. *See State v. Rannow*, 703 N.W. 2d 575, 578 (Minn. App. 2005); *Juhl v. State*, 172 P.3d 896 (Colo. 2007). But more importantly, respondent simply disregards the fact that the appellate courts in those states considered the question presented in this case and—contrary to the conclusion reached by the Oregon Supreme Court—read the rule from *Apprendi* and *Blakely* as applying only to sentences for individual offenses and not to aggregate-sentencing determinations. *See* Pet. 22, 23-24.

Third, respondent eliminates Alaska and Indiana from the mix because the factual findings in those jurisdictions were judicially, rather than statutorily, imposed. Br. in Opp. 5-7. But that distinction is insignificant for *Apprendi* and *Blakely* purposes. What matters is whether states require factual findings in order to make a sentencing determination—either a departure sentence or, as in this case, a consecutive sentence. And for purposes of the question presented here, the critical point is that the Alaska and Indiana appellate courts concluded that *Apprendi* and *Blakely* do not apply to the findings necessary for consecutive sentences, contrary to the Oregon Supreme Court's holding. Pet. 20-21, 22-23.

Finally, respondent simply removes Tennessee from consideration because the Tennessee Supreme Court has now granted review in cases raising this issue. Br. in Opp. 3 n. 2. But those grants of review do not eliminate Tennessee from the equation and—in the end—it is immaterial which side of the split the Tennessee Supreme Court falls on. It is enough to note simply that Tennessee requires findings to impose consecutive sentences, and that it has long wrestled with—and continues to wrestle with—the federal constitutional issue presented here. Pet. 21-22.

To be sure, there is some disagreement among the state courts about how best to characterize the extent of the split. The State in its petition took a conservative approach to categorizing the holdings of the various states on the question presented in the petition. But any disagreement about how to quantify the split cannot render the split insignificant or mask the need for this Court to clarify whether *Apprendi* and *Blakely* apply to consecutive sentencing.

Even if respondent were correct that the split on the question presented is somewhat smaller than the State described, this Court should grant the petition to address the uncertain and inconsistent application of the rules announced in *Apprendi* and *Blakely*. It is unquestioned that a split exists on this important question of federal constitutional law, and that the split is driven by differing views on whether this Court intended *Apprendi* and *Blakely* to apply to aggregate-sentencing determinations. Whether the split is 13-to-2, as some state appellate judges have construed it, or 7-to-3, as the State continues to assert, or

even 2-to-1, as respondent acknowledges, it is undisputed that state courts are applying this Court's Sixth Amendment caselaw inconsistently, based on uncertainty about what this Court intended. Even the more modest split that respondent acknowledges would warrant this Court's review, because it would mean—at a minimum—that the federal constitutional right to a jury trial is being applied more broadly in Oregon than in Maine and Illinois. This Court should grant review, should decide whether the *Apprendi* and *Blakely* rule is offense specific or applies to aggregate-sentencing determinations, and should thereby establish a uniform application of the federal constitutional right to a jury trial.

B. The question presented in this case has significant consequences and cannot be addressed through subsequent state-court litigation.

Respondent also asserts that the Oregon Supreme Court's holding on the question presented is "inconsequential" because it will apply in only a small percentage of the criminal proceedings in Oregon and because the State is attempting to limit the impact of that holding in litigation in other cases. Br. in Opp. 11-18. Neither argument is correct.

It should not be at all surprising that the State is now attempting in other cases to limit the impact of the Oregon Supreme Court's holding. As it stands, that holding has immense consequences not only for sentencing, but on pleading, settlement and other criminal litigation issues in Oregon. Contrary to respondent's assertion that this issue will arise in less

than five percent of the criminal cases in the state (Br. in Opp. 12), the reach is considerably greater. First, respondent incorrectly asserts that the rules announced in *Apprendi* and *Blakely* are limited to cases in which defendants have jury trials. Br. in Opp. 12. But given that the defendants in both *Apprendi* and *Blakely* had no jury trial and pled guilty, the error in respondent's assertion is plain. Rather, the rule applies and must be accounted for—in one way or another—in every single case involving a sentence enhancement: under *Apprendi* and *Blakely*, a defendant must either admit the enhancement fact or the state must prove the enhancement fact beyond a reasonable doubt to the trier of fact (which may be a judge if the defendant tenders the appropriate waiver).

It follows that, under the Oregon Supreme Court's decision, the state must comply with the *Apprendi* and *Blakely* requirements in all cases in which consecutive sentences are imposed. Under current Oregon law, as the Oregon Supreme Court made clear in this case, factual findings are necessary for the imposition of a consecutive sentence. The application of *Apprendi* and *Blakely* to the aggregate-sentencing determination means that in all cases in which consecutive sentences are contemplated, the defendant must have admitted the required fact, the jury must find the fact, or the defendant must have waived the jury-trial right and agreed to permit the trial judge to make the necessary factual determination. And the proof-beyond-a-reasonable-doubt standard attaches in all cases involving a finding to support a consecutive

sentence and applies at all trials, whether to the court or a jury. By no means can the impact of the decision fairly be characterized as "inconsequential" or "trifling."

The State's ongoing state-court efforts to narrow the impact of the Oregon Supreme Court decision are largely irrelevant for the question presented in the State's petition. On that question—whether the rule from *Apprendi* and *Blakely* extends to findings necessary to impose consecutive sentences—the State has no basis on which to challenge the core holding except to seek this Court's review and reversal of that holding. The additional arguments the State is making in other cases, and that respondent refers to (Br. in Opp. 14-18), all *start* from the basic holding that the Oregon Supreme Court articulated in this case—that the rules of *Apprendi* and *Blakely* apply to the factual findings required for consecutive sentences. The State did not make those additional arguments in this case (Br. in Opp. 14) because they would not apply to the specific circumstances of this case. Moreover, in these other cases that respondent refers to, the State has accepted the Oregon Supreme Court's construction of the state statute as requiring findings in order to impose consecutive sentences.

The State's efforts to soften the impact of the Oregon Supreme Court's holding primarily have focused on identifying the subset of cases in which the requisite findings can be deemed to be inherent in the verdict of guilt. The State's position that, under *Apprendi* and *Blakely*, the facts reflected by the jury's verdict sometimes may authorize consecutive sen-

tences is entirely unremarkable and expressly contemplated by this Court's caselaw. *See Blakely*, 542 U.S. at 303 (sentence may be based on facts reflected in the jury verdict).

Whether the State's efforts will ultimately prove successful in narrowing the impact of the Oregon Supreme Court's holding in this case is speculative at this point, is irrelevant to the question which the Oregon Supreme Court and other state appellate courts have addressed, and is not a basis for denying the petition. Two points about the ongoing litigation in other cases in the Oregon courts are worth emphasizing. First, that additional litigation will likely take years and many cases before the unanswered questions are resolved and the full impact of the Oregon Supreme Court's opinion in this case is known. All of that litigation is unnecessary and would be avoided if the Oregon Supreme Court's basic holding is reversed by this Court. Second, none of the State's arguments in these other cases is directed at the Oregon Supreme Court's core holding—that the rules announced in *Apprendi* and *Blakely* apply to the factual findings required for imposition of consecutive sentences. Whether that core holding is correct is the question presented in this petition and, on that question, nothing suggests that the Oregon Supreme Court will revisit its holding, in light of the thoughtful and extensive analysis that both the majority and the dissent articulated.

Nor should the fact that the Oregon Legislative Assembly might be able to adapt to the Oregon Supreme Court holding dissuade this Court from re-

viewing the question presented. Br. in Opp. 12. Again, if this Court determines that that holding is incorrect, the state legislature need not alter the state policy it has established for imposition of consecutive sentences. It should be required to take those steps only if the policy changes are truly required by the federal constitution.

C. Respondent largely ignores the State's argument that, aside from the split, this case presents an important question about the scope of this Court's decisions in *Apprendi* and *Blakely* that is deserving of review.

Finally, it is noteworthy that respondent disregards the importance of the federal constitutional question presented in this case. Even if no other state appellate court had addressed that question, this case would be appropriate for this Court's review for the reasons the State discussed at some length in the petition. Pet. 28-35. The Oregon Supreme Court's decision clearly presents the significant issue of how broadly this Court intended states to apply *Apprendi* and *Blakely*. The issue is one of national consequence with a significant impact on the policy choices available to states in handling aggregate-sentencing determinations. The Oregon Supreme Court produced two thoughtful and well-analyzed opinions that describe very different approaches and conclusions about the scope of the Sixth Amendment jury-trial right. Those opinions directly and clearly address the question presented in this case, they rely exclusively on considerations of federal constitutional law, and

they reflect no procedural impediments to this Court's review.

CONCLUSION

For the reasons set out in the petition and in this reply brief, this Court should grant the State's petition for writ of certiorari.

Respectfully submitted,
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February 15, 2008

JOINT APPENDIX

Supreme Court, U.S.
FILED
JUN 2 - 2008
OFFICE OF THE CLERK

No. 07-901

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

On Writ of Certiorari to the
Oregon Supreme Court

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED January 4, 2008
CERTIORARI GRANTED March 17, 2008

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IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON,

Plaintiff,

v.

ICE, THOMAS EUGENE,
(DOB: 01/04/61)

Defendant.

SECRET INDICTMENT

No. 99C49779

The defendant is accused by the Grand Jury of the County of Marion and the State of Oregon, by this indictment of the criminal offense(s) of:

COUNT 1 – ORS 164.225 F/A – BURGLARY IN THE FIRST DEGREE

COUNT 2 – ORS 163.427 F/B – SEXUAL ABUSE IN THE FIRST DEGREE

COUNT 3 – ORS 163.427 F/B – SEXUAL ABUSE IN THE FIRST DEGREE

COUNT 4 – ORS 164.225 F/A – BURGLARY IN THE FIRST DEGREE

COUNT 5 – ORS 163.427 F/B – SEXUAL ABUSE IN THE FIRST DEGREE

COUNT 6 – ORS 163.427 F/B – SEXUAL ABUSE IN THE FIRST DEGREE

committed as follows:

COUNT 1 - - - The defendant, on or between 12/01/06 and 07/07/97 in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling, located at 5200 Windsor Island Road N, Keizer,

OR, with the intent to commit the crime of Sexual Abuse in the First Degree therein. The state further alleges that the above-described offense occurred in an occupied dwelling.

COUNT 2 - - - As part of the same act and transaction as alleged in COUNT 1 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller a person under the age fourteen years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.

COUNT 3 - - - As part of the same act and transaction as alleged in COUNT 1 and COUNT 2 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller a person under the age of fourteen years, to sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

COUNT 4 - - - In an act of the same or similar character as alleged in COUNT 1 above, the defendant on or between 12/01/96 and 7/07/97, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling, located at 5200 Windsor Island Road N, Keizer, OR, with the intent to commit the crime of Sexual Abuse in the First Degree therein. The state further alleges that the above-described offense occurred in an occupied dwelling.

COUNT 5 - - - In an act of the same or similar character as alleged in COUNT 2 and COUNT 3, and as part of the same act or transaction as alleged in COUNT 4 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly subject Ashlee Miller a person under the age of fourteen years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.

COUNT 6 - - - In an act of the same or similar character as alleged in COUNT 2, COUNT 3 and COUNT 5, and as part of the same act or transaction as alleged in COUNT 4 and COUNT 5 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly subject Ashlee Miller a person under the age of fourteen years, tow sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

Witnesses: All Witnesses appeared in person unless otherwise noted.
Ashlee Miller – vic
Katheleen Miller – wit

A TRUE BILL,

/s/ Janice A Hesjson
Grand Jury Foreperson

sjt/93446:dw
DA#: 9808726
Keip 9807865

DALE W. PENN
Marion County District Attorney

CNTRL#: **Def needs to be printed **
WARRANT REQUEST – NCIC

/s/ Stephanie Tuttle
DATE: August 4, 1999

Based upon the attached affidavit: IT IS ORDERED that a warrant be issued for the arrest of the defendant; bail being set in the amount of:"
$160,000

CLERK'S CERTIFICATE
I hereby certify this copy to be a true, full and correct copy of the original now on record my office.

_____	_____
Date	Clerk of the Circuit Court
	By:_____
_____	Deputy
Judge	

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON,

Plaintiff,

v.

THOMAS EUGENE ICE,

No. 99C-49779

Defendant.

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JURY TRIAL TRANSCRIPT

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Dennis J. Graves on the 11th day of April, 2000, at 1:36 p.m., at the Marion County Courthouse, Salem, Oregon.

APPEARANCES

Stephanie Tuttle, Deputy District Attorney,
representing the State.

Gale M. Rieder, Attorney at Law,
representing the Defendant.

Marty Randall, RPR, CSR
Official Court Reporter
Marion County Courthouse

THE COURT: Ladies and gentlemen, since it is past 12:00, I want you to know that, number 1, we have ordered your lunch and it should be waiting for you shortly after you return to the jury room. So you'll be able to have lunch and then get to your business of making a decision in this case.

I'm now going to instruct you on the law as it applies in the case you have heard today. As I stated, you will have two -- I didn't tell you this. You will have two copies of these written instructions to share in the jury room. And you will also have the verdict form, which I will mention later.

The court has written jury instructions for your use, as I have told you. When you use these written jury instructions, do not place undue emphasis on any particular instruction but, rather, view the instructions as a whole.

It is your sole responsibility to make all the decisions about the facts in this case. You must evaluate the evidence to determine how reliable or how believable that evidence is. When you make your decision about the facts, you must then apply the legal rules to those facts and reach your verdict.

Remember, however, that your power to reach a verdict is not arbitrary. When I tell you what the law is on a particular subject or tell you how to evaluate certain evidence, you must follow these instructions.

Do not allow anything I have said or done during the course of this trial to suggest that I have formed any opinion about this case. Keep in mind that a judge is required by law to give certain instructions in every criminal case.

When I have sustained objections to evidence or ordered that evidence be stricken or excluded from your consideration, you must follow these rulings. Do not consider such matters during your deliberations. Base your verdict on the evidence and these instructions.

The attorneys' statements and arguments are not evidence. If your recollection of the evidence is different from the attorneys' recollection, you must rely on your own memory.

In deciding this case, you are to consider all the evidence you find worthy of belief. It is your duty to weigh the evidence, calmly and dispassionately, and to decide this case on its merits. Do not allow bias, sympathy or prejudice any place in your deliberations. Do not decide this case on guesswork, conjecture or speculation. Do not consider what sentence might be imposed by the court if the defendant is found guilty.

Generally, the testimony of any witness whom you believe is sufficient to prove any fact in dispute. You are not simply to count the witnesses, but you are to weigh the evidence.

Keep in mind that each party is entitled to the considered decision of each juror. Therefore, you should not give undue weight to another juror's notes if those notes conflict with your recollection of the evidence.

In this case the defendant is charged with the crimes of burglary in the first degree and sexual abuse in the first guilty. In summary, these charges allege as follows. And there are six counts. I will read each count.

Count 1. The defendant, on or between December 1, 1996, and July 7, 1997, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling located at 5200 Windsor Island Road North, Keizer, Oregon, with the intent to commit the crime of sexual abuse in the first degree therein. The State further alleges that the above-described offense occurred in an occupied dwelling.

Count 2. As part of the same act and transaction as alleged in count 1 above, the defendant, on or between 12-1 1996, and 7-7, 1997, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age of 14 years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.

Count 3. As part of the same act and transaction as alleged in count 1 and count 2 above, the defendant, on or between 12-1, 1996, and 7-7, 1997, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age of 14 years, to sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

Count 4. In an act of the same or similar character as alleged in count 1 above, the defendant, on or between 12-1, 1996, and 7-7, 1997, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling located at 5200 Windsor Island Road North, Keizer, Oregon, with the intent to commit the crime of sexual abuse in the first degree therein. The State further alleges that the above-described offense occurred in an occupied dwelling.

Count 5. In an act of the same or similar character as alleged in count 2 and count 3, and as part of the same act or transaction as alleged in count 4 above, the defendant on or between 12-1, 1996, and 7-7, 1997, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly subject Ashlee Miller, a person under the age of 14 years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.

Count 6. In an act of the same or similar character as alleged in count 2, count 3 and count 5 and as part of the same act or transaction as alleged in count 4 and count 5 above, the defendant, on or between 12-1, 1996, and 7-7, 1997, in

Marion County, Oregon, did then and there unlawfully, feloniously and knowingly subject Ashlee Miller, a person under the age of 14 years, to sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

The defendant has entered a plea of not guilty to these charges. A plea of not guilty is a denial of every material element alleged.

The term witness includes every person who has testified under oath in this case. Every witness has taken an oath to tell the truth. In evaluating each witness's testimony, however, you may consider such things as,

(1) The manner in which the witness testifies;

(2) The nature or quality of the witness's testimony;

(3) Evidence that contradicts the testimony of the witness;

(4) Evidence concerning the bias, motives or interests of the witness;

(5) Evidence that the witness has been convicted of a previous crime.

If you find that a witness has been convicted of a crime, you may consider this conviction only for its bearing, if any, on the believability of the witness's testimony.

An expert witness is a person with special skills or education in a particular field. Even though expert witnesses may testify about their opinions, you are not required to accept these opinions.

To determine the value, if any, you will give to an expert's opinion, you should consider such things as the expert's qualifications, the expert's opportunity and ability to form the opinion, the expert's believability, and how the expert reached the opinion or conclusion.

In deciding this case, you may draw inferences and reach conclusions from the evidence provided that your inferences and conclusions are reasonable and are based on your common sense and experience.

There are two types of evidence. One is direct evidence such as the testimony of an eyewitness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of a certain fact. You may base your verdict on direct evidence or on circumstantial evidence or both.

When a witness testifies about statements made by the defendant, you should consider such testimony with caution. In reviewing such testimony, you should consider, among other things, the following:

(1) Did the defendant make the statement and, if so, did the defendant clearly express what he intended to say?

(2) Did the witness correctly hear and understand what the defendant said?

(3) Did the witness correctly remember and relate what the defendant said?

(4) Did the witness intentionally or mistakenly alter some of the words used by the defendant, thereby changing the meaning of what was actually said?

If, after weighing such factors, you conclude that the defendant said what he intended to say and that the witness to this statement correctly understood, remembered and related to you what the defendant said, then you are authorized to consider such statements for what you deem them to be worth.

The defendant is innocent unless and until the defendant is proven guilty beyond a reasonable doubt. The burden is on

the State to prove the guilt of the defendant beyond a reasonable doubt.

Reasonable doubt is based on common sense and reason. Reasonable doubt means an honest uncertainty as to the guilt of the defendant. Reasonable doubt exists when, after careful and impartial consideration of all the evidence in this case, you are not convinced to a moral certainty that the defendant is guilty.

A defendant has an absolute constitutional right not to testify. Therefore, a defendant's decision not to testify cannot be considered as an indication of guilt. It should not be commented upon or in any way considered by you in your deliberations.

If you find that the defendant has been previously convicted of a crime, you may not use this evidence for the purpose of drawing the inference that because the defendant was convicted of a previous crime the defendant may be guilty of the crime charged in this case.

Under certain circumstances a party may request the court to receive certain evidence without proving that evidence by calling a witness or introducing a document.

The court has decided to allow into evidence the following facts:

On August 7, 1997, defendant entered a plea of guilty to the charge of burglary in the first degree in Marion County case number 97C-21062. The defendant pled guilty to, quote, on or between March 1, 1997, and March 31, 1997, in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling located at 5200 Windsor Island Road, Keizer, Oregon, with the intent to commit the crime of sexual abuse and stalking therein. The

State further alleges that the above-described offense occurred in an occupied dwelling.

Defendant was sentenced after that plea of guilty on February 24, 1998.

In the case of Kathleen Dougherty and Ashlee Dougherty versus Citizens Property Management, Incorporated, Mong Tung and Kai Lan Tam, Marion County case number 97C-13498, the complaint was filed October 9, 1997, the first amended complaint was filed on January 21, 1998, and the second amended complaint weas filed on April 13, 1998.

You are required to accept these facts as conclusive. It is, however, your sole responsibility to determine what weight, if any, you will give to these facts in reaching your verdict.

Oregon law provides that a person commits the crime of burglary in the first degree if a person enters or remains unlawfully in a dwelling with the intent to commit a crime therein.

In this case to establish the crime of burglary in the first degree, the State must prove beyond a reasonable doubt the following five elements:

(1) The act occurred in Marion County, Oregon;

(2) The act occurred on or between 12-1, 1996, and 7-7, 1997;

(3) Thomas Eugene Ice entered and remained unlawfully in the premises described in the charge;

(4) The premises described in the charge is a dwelling; and

(5) At the time of entering or remaining unlawfully, Thomas Eugene Ice had the intent to commit the crime of burglary in the first degree therein.

If you find the defendant guilty of burglary in the first degree, then you must consider the additional allegation that the offense occurred in an occupied dwelling. The State bears the burden to prove the allegation to be true beyond a reasonable doubt.

In order for the jury to return a finding of yes on that allegation, at least ten of the jurors who voted to find the defendant guilty of burglary in the first degree must agree that the State has proved the offense occurred in an occupied dwelling.

A person acts intentionally or with intent when that person acts with a conscious objective either, one, to cause a particular result or, two, to engage in particular conduct.

Dwelling means a building that regularly or intermittently is occupied by a person lodging therein at night whether or not a person is actually present.

Oregon law provides that a person commits the crime of sexual abuse in the first degree when that person knowingly subjects another person to sexual contact and the victim is less than 14 years of age.

In this case, to establish the crime of sexual abuse in the first degree, the State must prove beyond a reasonable doubt the following four elements:

(1) The act occurred in Marion County, Oregon;

(2) The act occurred on or between 12-1, 1996, and 7-7, 1997;

(3) Thomas Eugene Ice knowingly subjected Ashlee Miller to sexual contact; and

(4) Ashlee Miller was less than 14 years of age.

A person acts knowingly or with knowledge if that person acts with an awareness either, one, that his or her conduct is

of a particular nature or, two, that a particular circumstance exists.

Sexual contact means any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party.

You are instructed that male and female genitals are sexual parts as a matter of law. You are instructed that female breasts are intimate parts as a matter of law.

When you return to the jury room, select one of your members to act as presiding juror. The presiding juror has no greater voting weight but is to preside over your deliberations and be the spokesperson for the jury. You should then deliberate and find your verdict.

If it becomes necessary during your deliberations to communicate with me, do so in writing. I will consult with the parties before responding. Remember that you are not to tell anyone, including me, how the jury stands numerically until you have reached a lawful verdict or have been discharged.

This being a criminal case, ten or more jurors must agree on your verdict. When you have arrived at a verdict, the presiding juror will sign the appropriate verdict form. I have that here. There is a space marked for the presiding juror to sign the form.

After you have reached your verdict, signal the bailiff. The court will be reassembled to receive your verdict.

Would you stand and raise your right hand?

(Bailiff sworn.)

THE COURT: You may now retire to the jury room, have lunch, and then begin your deliberations.

(Jury retires to deliberate at 12:34 p.m.)

THE COURT: Any exceptions to the instructions from the defense?

MS. RIEDER: None.

THE COURT: And any by the State?

MS. TUTTLE: No, your Honor.

THE COURT: Thank you. We are adjourned.

(A recess.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON,

Plaintiff,

v.

Thomas Eugene Ice,

Defendant.

No: 99C49779

DEFENDANT'S SENTENCING MEMORANDUM

This matter came before the Hon. Dennis Graves, Marion County Circuit Court Judge for trial to a jury on April 11, 2000. Defendant was charged by indictment as follows:

> COUNT 1 - - - The defendant, on or between 12/01/96 and 07/07/97 in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling, located at 5200 Windsor Island Road N, Keizer, OR, with the intent to commit the crime of Sexual Abuse in the First Degree therein. The state further alleges that the above-described offense occurred in an occupied dwelling.
>
> COUNT 2 - - - As part of the same act and transaction as alleged in COUNT 1 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age fourteen years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.
>
> COUNT 3 - - - As part of the same act and transaction as alleged in COUNT 1 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age fourteen years, to sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

COUNT 4 - - - In an act of the same or similar character as alleged in COUNT 1 above, the defendant, on or between 12/01/96 and 07/07/97 in Marion County, Oregon, did then and there unlawfully, feloniously and knowingly enter and remain in a dwelling, located at 5200 Windsor Island Road N, Keizer, OR, with the intent to commit the crime of Sexual Abouse in the First Degree therein. The state further alleges that the above-described offense occurred in an occupied dwelling.

COUNT 5 - - - In an act of the same or similar character as alleged in COUNT 2 and COUNT 3, and as part of the same act and transaction as alleged in COUNT 4 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age fourteen years, to sexual contact by touching her vagina, a sexual or intimate part of Ashlee Miller.

COUNT 6 - - - In an act of the same or similar character as alleged in COUNT 2 and COUNT 3 and as part of the same act and transaction as alleged in COUNT 4 above, the defendant on or between 12/01/96 and 07/07/97, in Marion County, Oregon, did unlawfully and knowingly subject Ashlee Miller, a person under the age fourteen years, to sexual contact by touching her breasts, a sexual or intimate part of Ashlee Miller.

Defendant was found guilty by jury verdict on April 13, 2000, a copy of the blank verdict form as submitted to the jury is attached as Exhibit "A".

MERGER

ORS 161.067 controls when a court must merge separate counts for sentencing. ORS 161.067 reads in pertinent part:

(1) When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations.

* * *

(3) When the same conduct or criminal episode violates only one statutory provision and involves only one victim, but nevertheless involves repeated violations of the same statutory provision against the same victim, there are as many separately punishable offenses as there are violations, *except* that each violation, to be separately punishable under this subsection, must be separated from other such violations by a sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent. Each method of engaging in deviate sexual intercourse as defined in ORS 163.305, and each method of engaging in unlawful sexual penetration as defined in ORS 163.408 and 163.411 shall constitute separate violations of their respective statutory provisions for purposes of determining the number of statutory violations.

Emphasis supplied. In the instant case, defendant was charged with two Burglary I charges, committed as separate incidents. Each burglary was committed with the intent to commit two counts of Sexual Abuse I. The indictment alleges the sexual abuse was committed by defendant's touching of victim's breasts and touching victim's vagina. On each occasion, once the defendant entered the victim's residence, the evidence at trial shows that defendant's conduct in committing the acts of Sexual Abuse in the First Degree was continuous and uninterrupted and lacking the requisite "sufficient pause" required by statute to constitute separately punishable violations of the statute. *See, e.g., State v. Stafford*, 157 OrApp 445, 460-01

(1998), *rev den* 329 Or 358 (1999) (incidents of defendant's touching of child victim's thigh were separated by several minutes).

In *Stafford*, the court found that each incident was appropriate for separate sentencing because defendant "... had the opportunity to pause and reflect on his conduct..." between each incident and "...to renounce his criminal objectives before acting further." *Id.* at 460-01. In the case at bar, defendant's actions in touching the breasts and vagina of the victim were continuous and were not separated by a sufficient interval of time to allow defendant to renounce his criminal conduct. ORS 161.067(3) requires as a matter of law that counts 3 and 4 merge for sentencing and be entered as one conviction, and that counts 5 and 6 merge for sentencing and be entered as one conviction.

Further, the Court does not have authority to make findings of fact at sentencing regarding defendant's conduct during the commission of the crime. The jury must determine which facts constitute the crime. *State v. Wedge*, 293 Or. 598 (1982) (quoting *State v. Quinn*, 290 Or. 383 (1981)). Accordingly, those factors constituting the crime which may result in a sentence more severe than contemplated by statute must be submitted to the jury for its consideration. Oregon Constitution, Art. I, Sec. 11; *Wedge, 293 Or. at 608.*

ORS 161.067(3) requires merger absent a factual determination of "...a sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent." The issue of defendant's pausing between the touching of the victim's breasts and vagina during each the commission of each burglary was not submitted to the jury (see attached Exhibit A) and cannot be determined at sentencing by the Court for purposes of ORS 161.067(3).

CONSECUTITVE SENTENCES

Under ORS 137.123(2), a court has authority to impose consecutive or concurrent sentences "...for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct..." The phrase "continuous and uninterrupted course of conduct" has the same meaning as the phrase "criminal episode," as defined in the former jeopardy statutes. *See, State v. Boyd*, 271 Or. 558, 565-66 (1975). Therefore a "continuous and uninterrupted course of conduct" means "conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective." ORS 141.505(4). The offenses meet this definition "if they are so closely linked in time, place and circumstance that a complete account of one charge cannot be related without relating the details of the other charge." *State v. Sparks*, 150 OrApp 293 (1997). Thus the court does have discretion to sentence defendant to consecutive sentences on counts 1 and 4 - - burglaries committed on separate dates. While it may be possible to relate details of the sexual abuse committed against the victim in this case without reference to the burglary, it is, in fact, the commission of the sexual abuse which makes the defendant's entry into victim's residence a burglary under the law. Defendant cannot be sentenced to consecutive sentences under ORS 137.123(2).

ORS 137.123(4) requires the court sentence defendant to concurrent sentences for those crimes committed during a "continuous and uninterrupted course of conduct" unless the Court makes certain findings under ORS 137.123(5).

> (5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:
>
> (a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental

violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course or conduct.

ORS 137.123(5).

If the court imposes consecutive terms under ORS 137.123(4) and (5), it must state on the record its findings which authorize the imposition of consecutive terms of sentences. *State v. Racicot*, 106 Or App 557, 561-62 (1991) (*in banc*).

MAXIMUM SENTENCE CALCULATIONS

ORS 137.121 mandates that the maximum consecutive sentences "which may be imposed for felonies committed on or after November 1, 1989, ... shall be as provided by rules of the Oregon Criminal Justice Commission." OAR 213-12-0020 imposes a limitation on the court's consecutive sentencing ability as follows:

(2)(b) The total incarceration term of the consecutive sentences, including the incarceration term for the primary offense, shall not exceed twice the maximum presumptive incarceration term or the prison term defined in OAR 213-008-0005(1) imposed pursuant to a dispositional departure of the primary sentence except by departure as provided by OAR 213-008-0070.

This rule is called the "400 percent" rule. To determine the maximum possible consecutive sentence under the "400 percent" rule, the court must first designate the defendant's "primary offense" for each criminal episode, *i.e.*, the offense with the highest crime seriousness ranking. OAR 213-003-001(17). In the case at bar, each offense is designated a crime seriousness score of 8. The presumptive sentences range as follows:

> Crime Seriousness Score = 8, Criminal History Score = B, Presumptive = 35-40 months
>
> Crime Seriousness Score = 8, Criminal History Score = A, Presumptive = 40-45 months

The Oregon Court of Appeals has held that "[I]n cases involving consecutive sentences that include incarceration imposed under Measure 11, the trial court cannot ignore the guideline rules that limit the duration of consecutive sentences." *State v. Skelton*, 153 OrApp at 590, *rev. den.* 327 Or 448 (1998). Therefore, in the case at bar, to determine the appropriate sentence under the rules of the Oregon Criminal Justice Commission as required by ORS 137.121, the court must "(1) first impose sentence on [any] Measure 11 offenses; (2) calculate the maximum presumptive term of the primary offense under the guidelines; and (3) if the Measure 11 sentence was greater than the guidelines maximum, sentence the guidelines offenses concurrently." *State v. Quintero*, 160 OR App 614, 619-20 (1999) (quoting *State v. Langdon*, 151 Or App 640 (1997)).

In this case, the maximum possible sentence under OAR 312-12-0020 for a single criminal episode with defendant's criminal history score of B, is 160 months; and the maximum possible sentence for a second single criminal episode with a defendant's criminal history score of A is 180 months.

Therefore, the court is limited in imposing sentence as follows:

First criminal episode:

Sexual Abuse I	Ballot Measure 11= 75 mos mandatory minimum, presumptive 35-40 mos, maximum 80 mos departure
Burglary I	presumptive sentence 35-40 mos, maximum 80 mos departure

Total sentence cannot exceed 160 months.

Second criminal episode:

Sexual Abuse I	Ballot Measure 11= 75 mos mandatory minimum presumptive 40-45 mos, maximum 90 mos departure
Burglary I	presumptive sentence 40-45 mos, maximum 90 mos departure

Total sentence cannot exceed 180 months.

DATED 4 day of June, 2000.

Respectfully submitted,

/s/ Gale M. Rieder
Gale M. Rieder, OSB 89345
Attorney for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

No. 99C49779

THE STATE OF OREGON,

Plaintiff,

v.

ICE, THOMAS EUGENE,

Defendant.

VERDICT

We, the jury, being duly impaneled and sworn in the above-entitled court and cause, do find the defendant:

Count 1 – BURGLARY IN THE FIRST DEGREE

_____ Not Guilty

_____ Guilty

If the jury finds the defendant guilty of Count 1 – Burglary in the First Degree, then you must be able to answer the following question:

Did the offense occur in an occupied dwelling?

_____ Yes

_____ No

Count 2 – SEXUAL ABUSE IN THE FIRST DEGREE (Vagina)

_____ Not Guilty

_____ Guilty

County 3 – SEXUAL ABUSE IN THE FIRST DEGREE (Breasts)

_____ Not Guilty

_____ Guilty

Count 4 – BURGLARY IN THE FIRST DEGREE

_____ Not Guilty

_____ Guilty

If the jury finds the defendant guilty of Count 4 – Burglary in the First Degree, then you must be able to answer the following question:

Did the offense occur in an occupied dwelling?

_____ Yes

_____ No

Count 5 – SEXUAL ABUSE IN THE FIRST DEGREE (Vagina)

_____ Not Guilty

_____ Guilty

Count 6 – SEXUAL ABUSE IN THE FIRST DEGREE (Breasts)

_____ Not Guilty

_____ Guilty

DATED this _____ day of April, 2000.

_____

Presiding Juror

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, No. 99C49779

Plaintiff,

v.

SENTENCING MEMORANDUM

ICE, THOMAS EUGENE,

Defendant.

On April 13th, 2000, the defendant was convicted at trial of the following:

Count	Charge	Grid	Presumptive Range	BM11 Min.
1	Burglary I	8B	35-40 mos.	N/A
2	Sexual Abuse I	8B	35-40 mos.	75 mos.
3	Sexual Abuse I	8B	35-40 mos.	75 mos.
4	Burglary I	8A	41-45 mos.	N/A
5	Sexual Abuse I	8A	41-45 mos.	75 mos.
6	Sexual Abuse I	8A	41-45 mos.	75 mos.

I. CALCULATING CRIMINAL HISTORY SCALE

The defendant has previously been convicted of two persons crimes: Sexual Abuse I in Linn County on 6/14/89 and Burglary I in an occupied dwelling in Marion County on 2/24/98. Based on those convictions, the defendant has a Criminal History Scale of "B" for counts 1, 2, and 3.

When a court sentences a defendant for convictions that are not part of a single criminal episode, the court may use the earlier criminal convictions to enhance the criminal history scale of the convictions from the later criminal episode(s). State v. Bucholz, 317 Or. 309 (1993); State v. Miller, 317 Or. 297 (1993). In the case at bar, counts one through three arise from one criminal episode, and counts four through six arise from a second criminal episode. Applying the Miller/Bucholz rule, the defendant has a Criminal History Scale of "A' for Counts 4, 5, and 6.

II. DETERMINATE SENTENCING

All of the defendant's charges require the court to impose a determinate sentence. Counts 2, 3, 5, and 6 fall under Ballot Measure 11 which requires a mandatory minimum 75-month determinate prison sentence for Sexual Abuse I convictions. The court may also make a finding that the defendant is not eligible for earned time credit pursuant to Senate Bill 936 for the balance of the time imposed beyond the Ballot Measure 11 mandatory minimum.

ORS 137.635 requires that determinate sentences be imposed on defendants who are convicted of certain crimes when they have previously been convicted of any crime from the same list. Counts 1 and 4 are Burglary in the First Degree; defendant was previously convicted of Burglary in the First Degree. Pursuant to ORS 137.635, his sentence must be declared determinate and he is therefore ineligible for earned time credit or good time on these counts.

III. CONSECUTIVE SENTENCES

The court has the discretion to impose consecutive sentences for each charge in this case. As previously noted, there are two separate criminal episodes involved in this case. Pursuant to ORS 137.123(2), the court may impose consecutive sentences "for criminal offenses that do not arise from the

same continuous and uninterrupted course of conduct..." The court may sentence the defendant to consecutive time for the two incidents.

Within each criminal episode, the court may also sentence consecutively, under either prong of ORS 137.123(5). When the offenses do arise from one criminal episode, the court may still impose consecutive sentences if it makes certain findings. The court must find:

> (a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> (b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury, or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct. ORS 137.123(5).

For each episode, the defendant is charged with Burglary I, Sexual Abuse I for touching the victim's vagina, and Sexual Abuse I for touching the victim's breasts. Each of the charged offenses represents the defendant's willingness to commit different crimes. The two Sexual Abuse I charges relate to different portions of the victim's body. The defendant was not willing to stop at touching just one of her intimate parts. Touching one part was not an incidental violation on the way to committing a more serious crime; he was clearly intending to commit separate crimes by his conduct. The Burglary I charge also shows his willingness to commit a separate crime. He took advantage of his position at the apartment complex

and used his own key to enter the victim's apartment in secret. He snuck into her bedroom at night when he knew people would be sleeping. The abuse had to have been pre-planned. His actions evidence a willingness to commit Burglary I in addition to his other offenses, not merely as an incidental violation on the way to his greater goal.

Alternatively, the crimes involved in each criminal episode involve qualitatively different harm to the victim. Touching the victim in different parts of her body equates to qualitatively different harm in that different parts of her body were violated. The Burglary I also involves different harm: The harm in that crime is the victim's loss of security in her own home; the harm in the Sexual Abuse I charges relates to the personal violation involved in such crimes. These are different types of losses suffered by the victim and can be recognized as such by the court.

IV. DEPARTURE FACTORS

There are several departure factors the court may consider in imposing sentence:

1. Persistent involvement in similar offenses. The defendant has previously been convicted of several property-related crimes, including Burglary in the Second Degree and Burglary in the First Degree. These can be used to depart for each of the current Burglary I charges. Likewise, the defendant has previously been convicted of Sexual Abuse in the First Degree. The court can impose an upward departure sentence pursuant to this factor for counts 5 and 6 based on the previous conviction coupled with the defendant's convictions in counts 2 and 3.

2. Previous incarcerations and probations haven't deterred the defendant. The defendant has previously been placed on several probations as well as incarcerated numerous times for a variety of crimes. Additionally, he has been found in viola-

tion of probation in several cases. Clearly this has not deterred his criminal conduct.

3. The defendant was on supervision at the time of the current offenses. The defendant was on probation for the crime of Failure to Register as a Sex Offender at the time he committed the current crimes.

4. Particularly vulnerable victim. The victim in this case was in a particularly vulnerable position. She was at home at night in her locked apartment. The defendant gained entry through the use of his pass key. This young girl in her locked home would not only have her guard down against this type of crime, but her mother would as well. Given the circumstances, the victim was particularly vulnerable.

V. RECOMMENDATION

The state respectfully recommends the following sentence:

Count 1: Burglary I. The defendant is an 8B with a presumptive sentence of 35-40 months. Based on the defendant's persistent involvement in similar offenses, the state recommends that the court finds a substantial and compelling reason for departure and impose sentence of 80 months in the Department of Corrections, followed by 36 months post-prison supervision. Further, the sentence should be deemed determinate, and the defendant should not be eligible for 936 programming or earned time credit.

Count 2: Sexual Abuse 1. The defendant is an 8B with a presumptive sentence of 35-40 months and a minimum required sentence of 75 months. Based on the fact the the defendant was on supervision at the time he committed this offense, the state recommends that the court find a substantial and compelling reason for departure and impose a sentence of 80 months in the Department of Corrections, followed by 40

months post-prison supervision, without eligibility for 936 programming or earned time credit. Given the fact that the conduct showed a willingness on the defendant's part to commit more than one offense, as well as the fact that it involved qualitatively different harm to the victim, the state recommends that this sentence be consecutive to Count 1.

Count 3: Sexual Abuse I. The defendant is an 8B with a presumptive sentence of 35-40 months and a minimum required sentence of 75 months. The state recommends 75 months in the Department of Corrections, followed by 45 months post-prison supervision, to run concurrent with counts 1 and 2.

Count 4: Burglary I. The defendant is an 8A with a presumptive sentence of 41-45 months. Based on the factor that repeated incarcerations and probations have not deterred the defendant's criminal conduct, the state recommends that the court find a substantial and compelling reason to depart and impose a sentence of 90 months to the Department of Corrections, followed by 36 months post-prison supervision. The sentence should be deemed determinate and the defendant should not be eligible for 936 programming or earned time credit. The state further recommends that this sentence be consecutive to counts 1, 2 and 3, based on the fact that it arose from a separate criminal episode.

Count 5: Sexual Abuse I. The defendant is an 8A with a presumptive 41-45 month sentence and a required minimum sentence of 75 months. Based on the factors of persistent involvement in similar offenses and that the victim was particularly vulnerable, the state requests that the court impose departure sentence of 90 months in the Department of Corrections, followed by 36 months post-prison supervision, without eligibility for 936 earned time credit or programming. Additionally, as this charge shows the defendant's willingness to commit more than one criminal offense, and the fact that it

involved qualitatively different harm to the victim than what occurred in count 4, the state requests that this sentence be consecutive to counts 1, 2, 3 and 4.

Count 6: Sexual Abuse I. The defendant is an 8A with a presumptive sentence of 41-45 months and a required minimum sentence of 75 months. The state recommends the court impose a sentence of 75 months in the Department of Corrections, followed by 45 months post-prison supervision, concurrent with Counts 1 through 5.

The state further recommends that all of the sentences be consecutive to any sentence the defendant is currently serving. Additionally, the defendant should be required to pay $100 unitary assessment on each count; a $500 unitary assessment on counts 2, 3, 5, and 6; and court-appointed attorney's fees. The state requests that the court also consider imposing compensatory fine for the victim for her current and future counseling costs. Finally, the defendant is required to provide a blood sample and register as a sex offender on counts 2, 3, 5, and 6.

Dated this 1st day of June, 2000.

/s/ Stephanie J. Tuttle
Stephanie J. Tuttle
Deputy District Attorney
OSB #93446

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, No: 99C49779

Plaintiff,

v.

THOMAS EUGENE ICE,

Defendant.

SUPPLEMENT TO DEFENDANT'S SENTENCING MEMORANDUM

The case of *Apprendi v. New Jersey* challenged a New Jersey statutory scheme, which caused a defendant, convicted by a jury of a second degree offense, to be sentenced by a judge, using facts not available to the jury, as though he'd been convicted of a first degree offense. *Apprendi v. New Jersey*, No. 99-478 (June 26, 2000). The Court held that New Jersey's statutory scheme was unconstitutional.

Holding that, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact* (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt," the court in *Apprendi* stated that "a state scheme that keeps from the jury facts exposing defendants to greater or additional punishment may raise serious constitutional concerns." *Id.* at 24 (emphasis added). Accordingly, it is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute.

DATED this 17 day of July, 2000.

/s/ Gale M. Rieder
Gale M. Rieder, OSB 89345
Attorney for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON,

Plaintiff,

v.

THOMAS EUGENE ICE,

No. 99C49779

Defendant.

SENTENCING TRANSCRIPT

BE IT REMEMBERED that the above-entitled matter came on regularly for hearing before the Honorable Dennis J. Graves on the 31st day of July, 2000, at 8:47 a.m., at the Marion County Courthouse, Salem, Oregon.

APPEARANCES

Stephanie Tuttle, Deputy District Attorney,
representing the State.

Gale M. Rieder, Attorney at Law,
representing the Defendant.

Marty Randall, RPR, CSR
Official Court Reporter
Marion County Courthouse

Whereupon, on the 31st day of July, at 8:45 a.m., the following proceedings were had:

MS. TUTTLE: This is the case of State versus Thomas Eugene Ice, case number 99C-4977. This is the time set for sentencing in this case. The defendant is present, in custody, with his lawyer, Mr. Rieder. The State is ready to proceed, your Honor.

THE COURT: Thank you. Ms. Rieder, have you had an opportunity to review the PSI with your client?

MS. RIEDER: I have, your Honor. There are no substantial errors or omissions in the PSI.

THE COURT: We would be talking about a corrected PSI since there was an error in the first one. I'm assuming the second one is the one you're referring to where you find no errors?

MS. RIEDER: I am. That's correct.

THE COURT: All right. I have received extensive memoranda from counsel in regard to sentencing in this case. Before I proceed to sentencing, does the State wish to add anything to what was previously stated in its memorandum?

MS. TUTTLE: Your Honor, I received a fax from Ms. Rieder responding to my letter regarding merger. Your Honor, I think we were talking a bit of apples and oranges. The State's position is because the defendant touched two different parts of this child's body that both of these convictions should stand as convictions and be reflected on his criminal history.

I think the case law supports that, particularly the case of State v. Wise in which the two firearms were stolen in a single criminal episode. That, of course, would be the same statute that was violated. The only difference would be the spe-

cific firearm that was alleged to be stolen. I would analogize this to that situation.

I think the other issue is regarding consecutive sentences. That is an entirely different issue. The State is not seeking consecutive sentences for the two types of touchings to each other. So I don't think we need to reach that issue.

Beyond that, I don't have anything further, your Honor.

THE COURT: All right. Ms. Rieder?

MS. RIEDER: Your Honor, this was briefed extensively by the parties. And the only issue we would add at the present time, this is for purposes of the record, is whether the burglary charges would constitute separate incidents.

It is the defendant's position under State v. Wedge, that without a specific finding of fact by the fact finder, that being the jury, that the court cannot make a finding on its own these are separate incidents. Therefore, the court is not free to treat it as separate incidents for the purposes of consecutive sentences, and that these must run concurrently.

THE COURT: Thank you.

MS TUTTLE: I realize we don't have anything on the record regarding that. Briefly, the State's position is that's the way the facts were, the way the case was argued, and the way the jury was instructed. It is very clear there were two separate incidents in this case.

There is really no issue about that, that there needed to be no question specifically regarding that to the jury based on the way the case was presented, and that they are indeed two separate incidents.

THE COURT: Thank you. Anything further to add, Ms. Rieder?

MS. RIEDER: Nothing further.

THE COURT: Mr. Ice, do you wish to address the court before you are sentenced?

THE DEFENDANT: I don't know what to say. I mean I -- I wish things could have been different in the trial. I do say that.

I mean I can't prove my innocence by me saying anything right now. I know I didn't do it, and I will state that fact. I didn't do this. I have already been convicted by a jury.

I have no life. I had no life when I was out there in the first place because I had to do my counseling, I was going to work, I was doing what I needed to do. I thought I was doing what I needed to do. But yet somebody used my past to convict me of something I didn't do again. So that's all I can say.

THE COURT: All right. Then the court will proceed to sentencing.

MS. RIEDER: Your Honor, there is one additional matter. I believe that the victim would have a right to be here. I would like us to note for the record whether or not the victim or the victim's mother has been notified of this and is choosing not to appear this morning.

MS TUTTLE: Yes, your Honor, they have been notified. We were expecting them. But I'm not that surprised that they're not here. But they have been notified about today's proceeding.

THE COURT: Okay. So you feel comfortable in going forward at this time?

MS. TUTTLE: I do, your Honor.

THE COURT: All right. All right. Based upon my review of the memoranda that have been drafted by counsel, which are extensive and were helpful to the court, I am prepared to sentence you, Mr. Ice, in this case.

First of all, in regard to count 1, burglary in the first degree, I find that the appropriate grid block is 8-B, that the presumptive range of sentence is 35 to 40 months. I do find that there are substantial and compelling reasons to do an upward departure for the reason that you have had persistent involvement in similar offenses. So, because of that, I am sentencing you to 80 months with 36 months post-prison supervision.

With regard to count 2, sexual abuse in the first degree, I find that the appropriate grid block is 8-B, that the presumptive sentence is 35 to 40 months, that this is a Ballot Measure 11 crime with a minimum of 75 months. However, I do find substantial and compelling reasons to depart. And that departure is based upon this crime being carried out while you were on supervision at the time it was committed. So I sentence you to 80 months in count 2 with 36 months post-prison supervision. Your sentence on count 2 will be consecutive to the sentence on count 1.

I make findings under ORS 137.123(5) since these offenses did arise from one criminal episode. Court can impose consecutive sentences if the court finds that the criminal offense for which consecutive sentence was contemplated was not merely an incidental violation of separate statutory provision. I do make that finding in this case, that it was an indication of your willingness to commit more than one criminal offense.

In addition, I find that in committing sexual abuse in the first degree that you caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim than you did in count 1. So, as I said, your sentence on count 2 will be consecutive to the sentence in count 1.

On count 3 I find that the appropriate grid block is 8-B, that the presumptive sentence is 35-40 months, that it is a Ballot Measure 11 offense, that the mandatory minimum is 75

months. I sentence you to 75 months. Your sentence on count 3 will be concurrent to the sentences on counts 1 and 2.

Count 4, burglary in the first degree, I find that the appropriate grid block is 8-A, that the presumptive range of sentence is 41-45 months. I do find substantial and compelling reasons to depart and impose a sentence in the amount of 90 months. That sentence will run consecutive to the sentences imposed under counts 1, 2 and 3.

I do find that this was a second separate incident involving a second burglary, that in this instance because you went back a second time to the dwelling that there was clear indication on your part of a willingness to commit additional criminal offenses and that you invaded this home again causing substantial loss to the defendant -- excuse me, to the victim in this case.

On count 5, sexual abuse in the first degree, I find that the appropriate grid block is 8-A, that the presumptive range is 41 to 45 months, that this a Ballot Measure 11 offense, 75 months being the minimum under Ballot Measure 11. I find substantial and compelling reasons to depart based upon the fact that repeated incarcerations and probations have not deterred your criminal conduct. And so I sentence you to 90 months with 36 months post-prison supervision. Your sentence on count 5 will run consecutive to the sentences in counts 1, 2, 3 and 4.

I make findings under ORS 137.123(5) that when you committed sexual abuse as alleged in count 5 that that was not merely an incidental violation of a separate statutory provision on the date that you committed burglary during that criminal episode and that by committing sexual abuse after committing burglary that you caused or created qualitatively different loss or injury to the victim than would have been

true simply for the burglary. Your period of post-prison supervision is 36 months.

Count 6, sex abuse in the first degree, find that the appropriate grid block is 8-A, that the presumptive range is 41 to 45 months. This is a Ballot Measure 11 offense with a 75 month minimum. I sentence you to 75 months under Ballot Measure 11. Your sentence for count 6 will run concurrent to the sentences for counts 1 2, 3, 4 and 5. Your period of post-prison supervision will be 45 months.

All of the sentences that I have imposed will be determinate and you will not be eligible for 936 programming or earn time credit.

In addition, you will be required to pay a $100 unitary assessment on each count, a $500 unitary assessment -- excuse me, a $100 unitary assessment on each count, $500 Chapter 163 assessment on counts 2, 3, 5 and 6, and court-appointed attorneys fees.

Finally, you will be required to provide a blood sample and register as a sex offender on counts 2, 3, 5 and 6.

Anything further requested by the State?

MS. TUTTLE: No, your Honor. The only thing was that on count 2 the post-prison supervision should actually be 40 months because it falls in the section of crimes where the post-prison supervision is up to the indeterminate maximum. I believe you sentenced him to 80 months. Rather than a 36 month post-prison supervision, it should be 40.

THE COURT: That was count 2?

MS TUTTLE: Yes, your Honor.

THE COURT: Grid block 8-B?

MS. TUTTLE: Right.

THE COURT: That is a Ballot Measure 11.

MS. TUTTLE: That is correct, your Honor. And I'm trying to think of the statute offhand. There is a statute that says for certain crimes the post-prison supervision term is the balance of the served time up to the maximum in indeterminate. Let's see if I can find that real quick.

MS. RIEDER: Your Honor, it may save Ms. Tuttle some time. We are in agreement that the statute requires the total custody sentence plus post-prison equal the statutory maximum, which in this case would be 120 months. So on counts 2 and 3 and 5 and 6 that determines the post-custody supervision time by subtracting the total custody time.

THE COURT: So you're in agreement that the post-prison supervision on counts 2 and 5 would be 40 months each; is that correct?

MS. RIEDER: On count 2 it would be 40 months. On count 5, because it's 90 months, it would be 30 months.

MS. TUTTLE: I think -- let me see if I can find the statute, your Honor. Because I do think in count 5 it would be 36.

MS. RIEDER: Excuse me. On count 5 it would be 45 months. I was looking at the wrong line.

MS. TUTTLE: Well, on count 5 you sentenced him to 90. So it would be 30 under that reasoning. Let me find the statute, because I think it should be 36 months.

THE COURT: All right.

MS. RIEDER: While she's looking that up, your Honor, the court did not articulate a post-custody supervision period for count 4, which is a burglary in the first degree.

THE COURT: That would be 36 months.

MS. RIEDER: Okay.

MS. TUTTLE: I can always find the probation one and I always have trouble finding the post-prison supervision one.

Your Honor, while I'm looking for that, the only other question I have is regarding the -- I didn't hear what the attorneys fees amount was.

MS. RIEDER: It's $1935.

THE COURT: All right. That will be the amount that will be required to be repaid.

(Off the record.)

THE COURT: Are you looking in Chapter 144?

MS. TUTTLE: Actually, I was looking in 137.

Maybe I was looking in the wrong spot.

THE COURT: Post-prison supervision begins at 144.096.

MS. TUTTLE: Oh, here we go. It's 144.103, I think. Thank you. Yeah. It's 163.427 that he violated. Maybe it does just go to 30 months. Let's just leave it at 30, your Honor. That's fine. It's not going to make a difference one way or the other.

THE COURT: So your question was in regard to count 5; is that correct?

MS. TUTTLE: Yeah. Count 2, I think the post-prison supervision should have been 40 months. And count 5, it looks like it should be 30 months. Count 3, it should be 45 months. And then count 6, likewise, it should be 45 months.

THE COURT: And the statute you're relying upon is?

MS. TUTTLE: 144 --

MS. RIEDER: 103.

MS. TUTTLE: 103, I think. Is that right?

MS. RIEDER: Yes.

MS. TUTTLE: Yeah. 144.103. the only other question I had, your Honor, was regarding the financial obligations --

THE COURT: Just a second, please.

MS. TUTTLE: I'm sorry, your Honor.

(Off the record.)

THE COURT: All right. I agree with your reading of 144.103.

Your sentence on count 2 will involve a period of post-prison supervision of 40 months and on count 5 the period of post-prison supervision will be 30 months in accordance with ORS 144.103.

Now, you were about to say, Ms. Tuttle?

MS. TUTTLE: Then the other question I had was with regard to the financial obligations. Is the court making the finding that with this much time in prison, with the requirement he work, that he will have the ability to pay, over the course of time, all these financial obligations, under your finding?

THE COURT: I do make that finding.

MS. RIEDER: Your Honor, we will object to the financial obligations, perhaps for the mere reverse of what Ms. Tuttle just stated. Because of the lengthy incarceration, it will be beyond his means to make these payments.

THE COURT: Thank you. Anything further?

MS. TUTTLE: Not from the State, your Honor.

MS. RIEDER: Nothing from the defendant.

THE COURT: Thank you, counsel, for your assistance. We are adjourned.

(Sentencing concluded at 9:12 a.m.)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 1

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Burglary 1, as alleged in Count 1 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 35-40 months, with a grid block of CSS: 8 / CHS: B

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE.

( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. ( ) THIS IS A BALLOT MEASURE 11 CONVICTION.

(X) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A HB 3488 (1997) PROPERTY CRIME SENTENCE.

(X) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

( ) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

( ) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

( ) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 80 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a firearm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL

& COMPELLING REASONS AS STATED IN THE RECORD, pursuant to SB 936 (1997) or based upon the fact that this is a 137.635 sentence.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

( ) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, ( ) _____.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference incorporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C4977

Count No. 1

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S $100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S_____ ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S_1935_ Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

___X___Defendant was found by the Court to be indigent and counsel was court appointed

S_2035_ TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

_X_ Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

__X__ Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule established by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

__X__ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 2

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Sexual Abuse 1, as alleged in Count 2 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 35-40 months, with a grid block of CSS: 8 / CHS: B

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE. ( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. (X) THIS IS A BALLOT MEASURE 11 CONVICTION.

( ) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A HB 3488 (1997) PROPERTY CRIME SENTENCE.

(X) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

(X) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

( ) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

(X) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 80 MONTHS. THE LENGTH OF POST-PRISON SUPERVISION SHALL BE 40 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a firearm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD, pursuant to SB 936 (1997) or based upon the fact that this is a 137.635 sentence.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

(X) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, (X) Count 1.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference in-

corporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C49779

Count No. 2

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S 100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S 500 ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S_____ Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

_____Defendant was found by the Court to be indigent and counsel was court appointed

S_600_ TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

_X_ Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

_X_ Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule established by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

_X_ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 3

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Sexual Abuse 1, as alleged in Count 3 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 35-40 months, with a grid block of CSS: 8 / CHS: B

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE. ( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. (X) THIS IS A BALLOT MEASURE 11 CONVICTION.

( ) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A HB 3488 (1997) PROPERTY CRIME SENTENCE.

( ) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

(X) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

(X) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

(X) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 75 MONTHS. THE LENGTH OF POST-PRISON SUPERVISION SHALL BE 45 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a firearm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD, pursuant to SB 936 (1997) or based upon the fact that this is a 137.635 sentence.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

( ) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, ( ) _____.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference in-

corporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C49779

Count No. 3

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S 100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S 500 ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S_____ Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

_____Defendant was found by the Court to be indigent and counsel was court appointed

S_600_ TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

_X_ Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

__X__ Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule established by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

__X__ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 4

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Burglary 1, as alleged in Count 4 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 41-45 months, with a grid block of CSS: 8 / CHS: A

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE. ( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. ( ) THIS IS A BM 11 (ORS 137.700) CONVICTION.

(X) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A HB 3488 (1997) PROPERTY CRIME SENTENCE.

(X) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

( ) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

( ) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

( ) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 90 MONTHS. THE LENGTH OF POST-PRISON SUPERVISION SHALL BE 36 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a firearm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD, pursuant to SB 936 (1997) or based upon the fact that this is a 137.635 sentence.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

(X) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, (X) Counts 1, 2, 3.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference in-

corporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C49779

Count No. 4

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S 100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S_____ ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S_____ Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

_____ Defendant was found by the Court to be indigent and counsel was court appointed

S_100_ TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

_X_ Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

_X_ Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule established by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

_X_ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 5

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Sexual Abuse 1, as alleged in Count 5 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 41-45 months, with a grid block of CSS: 8 / CHS: A

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE. ( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. (X) THIS IS A BM11 (ORS 137.700) CONVICTION.

( ) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A ORS 137.717 PROPERTY CRIMES SENTENCE.

(X) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

(X) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

(X) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

( ) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 90 MONTHS. THE LENGTH OF POST-PRISON SUPERVISION SHALL BE 30 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a fircarm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD, pursuant to ORS 137.750 or based upon the fact that this is a 137.700 sentence (Ballot Measure 11).

( )_____.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

(X) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, (X) Counts 1, 2, 3, 4.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference incorporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C49779

Count No. 5

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S 100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S 500 ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S_____ Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

_____ Defendant was found by the Court to be indigent and counsel was court appointed

S_600__ TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

_X_ Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

_X_ Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule established by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

_X_ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

THE STATE OF OREGON, JUDGMENT

plaintiff,

v.

Case # 99C49779

Count # 6

ICE, THOMAS EUGENE,

defendant.

Defendant has been convicted of Sexual Abuse 1, as alleged in Count 6 of the ( ) amended indictment/information, by ___ Guilty plea; ___ No Contest plea; X Jury/Court verdict; ____ Stipulated facts verdict. X Defendant is present with legal counsel. ____ Defendant knowingly waived attorney after advice of rights.

The Court finds a presumptive ( ) probationary (X) prison term of 41-45 months, with a grid block of CSS: 8 / CHS: A

IT IS ORDERD THAT: THIS (X) IS ( ) IS NOT A GUIDELINES SENTENCE. ( ) THIS IS A STIPULATED SENTENCE. ( ) THIS IS A PRESUMPTIVE SENTENCE. (X) THIS IS A PERSON CRIME CONVICTION. (X) THIS IS A BM11 (ORS 137.700) CONVICTION.

( ) THIS SENTENCE IS A DETERMINATE SENTENCE PURSUANT TO ORS 137.635. ( ) THIS IS A ORS 137.717 PROPERTY CRIMES SENTENCE.

( ) THIS SENTENCE IS A DURATIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS A DISPOSTIONAL DEPARTURE, & THE COURT FINDS SUBSTANTIAL AND COMPELLING REASONS AS STATED IN THE RECORD.

( ) THIS SENTENCE IS AN OPTIONAL PROBATIONARY SENTENCE, & THE COURT MAKES THE SPECIFIC FINDINGS AS REQURIED & AS STATED IN THE RECORD.

(X) THE COURT FINDS THAT DEFENDANT HAS BEEN CONVICTED OF A CRIME SPECIFIED IN ORS 137.076 AND THEREFORE ORDERS THAT DEFENDANT SHALL PROVIDE A BLOOD SAMPLE at the direction of MCCC/OSDC.

(X) DEFENDANT SHALL REGISTER as a sex offender pursuant to ORS 18.594-.596.

( ) DEFENDANT SHALL submit to an HIV test pursuant to ORS 135.139.

(X) DEFENDANT SHALL BE COMMITTED TO THE CUSTODY OF OREGON STATE DEPARTMENT OF CORRECTIONS/MARION COUNTY SUPERVISORY AUTHORITY FOR 75 MONTHS. THE LENGTH OF POST-PRISON SUPERVISION SHALL BE 45 MONTHS. If defendant violates conditions of post-prison supervision, defendant shall be subject to sanctions including possibility of additional imprisonment.

( ) The Court finds beyond a reasonable doubt that defendant used or threatened the use of a firearm. The defendant shall serve a mandatory minimum of _____ pursuant to ORS 161.610.

( ) Defendant MAY be considered for various leave, release or program options pursuant to SB 936, section 14 (1997).

(X) Defendant MAY NOT be considered for leave, release or program options under SB 936, based upon SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD, pursuant to ORS 137.750 or based upon the fact

that this is a conviction pursuant to ORS 137.700 (Ballot Measure 11).

( )_____.

( ) DEFENDANT SHALL BE PLACED ON PROBATION TO ( ) Marion County Corrections ( ) Court ( ) Pursuant to 137.012 for a period of _____ months with the following conditions comprising the terms thereof:

DEFENDANT SHALL SERVE THE SANCTION UNITS SET FORTH IN THE ATTACHED CONDITIONS OF PROBATION, IN A CORRECTIONAL FACILITY OR AS PART OF A CUSTODY PROGRAM.

( ) THE COURT FINDS SUBSTANTIAL & COMPELLING REASONS AS STATED IN THE RECORD to DEPART on the number of sanction units available for use during the probation term, for a TOTAL OF _____ SANCTION UNITS, WITH ___ _____ UNITS IN THE CUSTODY OF THE MARION COUNTY JAIL.

( ) Defendant shall NOT receive credit for presentence incarceration.

(X) Defendant shall obey all municipal, county, state and federal laws.

( ) Attached conditions of supervision dated _____ are incorporated herein.

( ) _____.

( ) The incarceration shall be served CONSECUTIVELY with: ( ) any sentence previously imposed, ( ) _____.

(X) DEFENDANT IS SENTENCED to pay to the Clerk of the Court the amounts designated under the Money Judgment section, which is set fourth hereafter and by this reference incorporated herein. DEFENDANT shall advise the clerk of any new address.

( ) State's motion to dismiss is allowed for count(s) _____

( ) Defendant shall not return to or reside illegally in the U.S.

( ) Defendant may be released sooner to the INS for purposes of deportation.

( ) The firearm seized is order surrendered pursuant to ORS 166.280.

IT IS FURTHER ORDERED that: Defendant stipulates probable cause exists that the following items are subject to SEIZURE under Oregon laws. The defendant forfeits all right, title, and interest to _____ in items: _____ Defendant waives all double jeopardy claims.

It is further ordered that: _____

_____

IT IS FURTHER ORDERED THAT ANY WARRANT FILED HEREIN SHALL BE WITHDRAWN.

Court No. 99C49779

Count No. 6

MONEY JUDGMENT

JUDMENT CREDITOR: STATE OF OREGON

JUDGMENT DEBTOR(S): Ice, Thomas Eugene and

_____, jointly and severally.

ITEMIZED OBLIGATIONS:

Restitution/Compensatory Fine, payable to the Clerk for the benefit of:

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) _____

(name and address of victim or agent)

S_____ ( ) Per Restitution Addendum/Compensatory Fine attached hereto and by this reference incorporated herein.

S 100 Unitary Assessment

S_____ Fine

S_____ Jail Assessment (if fine imposed)

S_____ of above fine is compensatory

S_____ LEM Assessment (if fine imposed)

S_____ of fine is suspended on condition defendant satisfactorily complete evaluation/treatment/education /classes/CSW/probation ordered herein

S_____ ORS Chapter 163 Assessment

S_____ of above assessments are waived

S_____ ORS Chapter 163 Assessment is suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

S_____ DNA costs payable to the Clerk for the benefit of the Marion County Sheriff's office.

S 500 Attorney Fees (Costs)

S_____ of Attorney Fees is waived/suspended on condition defendant satisfactorily complete evaluation/treatment/education/classes/CSW/probation ordered herein

_____Defendant was found by the Court to be indigent and counsel was court appointed

S 600 TOTAL AMOUNT OF MONEY JUDGMENT (excluding any suspended/waived amount)

Defendant shall pay this Money Judgment to the Court Clerk according to the following terms:

X Pay the balance of this money judgment immediately.

____ Make payments in accordance with a schedule of payments established by defendant's probation officer/collections officer ( ) Report immediately/by _____ to Collections Officer at 4000 Aumsville Hwy. or 100 High St NE, Salem, OR

____Pay S_____ per month to the Clerk beginning the ____ day of _____, and continue each month until balance is fully paid.

____ Pay the money judgment balance within _____ days after release from custody upon this judgment.

X Defendant shall pay the Restitution and/or Compensatory Fine imposed herein according to the payment schedule estab-

lished by the Department of Corrections and/or the Board of Parole and Post Prison Supervision pursuant to ORS 144.275 upon defendant's release from prison.

_X_ IT IS FURTHER ORDERED that defendant shall pay in full all financial obligations imposed herein at a rate to be set by the supervisory authority after release from incarceration and before active supervision ends.

IT IS FUTHER ORDERED That: _____

_____

_____

IT IS FURTHER ORDERED AND ADJUDGED that the Clerk apply payment upon this money judgment as provided by law and apply any bail or security on deposit herein toward this money judgment and, to the extent permitted by law, disburse them first to restitution, to compensatory fines, Crime Victim Assessment, fines, assessments, fees and then to other costs adjudged herein.

Judge Graves DATED this 31st day of July, 2000

Ct. Rptr. Randall

DDA SJT /s/ Dennis Graves

Def Atty Rieder CIRCUIT COURT JUDGE

Arresting Agency Keizer PD

Crime Date 12/1/96 – 7/7/97

PETITIONER'S BRIEF

94

(5)

No. 07-901

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

BRIEF FOR PETITIONER STATE OF OREGON

On Writ of Certiorari to the
Oregon Supreme Court

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

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BRIEF FOR PETITIONER STATE OF OREGON

OPINIONS BELOW

The Oregon Court of Appeals affirmed respondent's convictions and sentences without issuing a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001). The Oregon Supreme Court reversed in a 5-2 decision reported at *State v. Ice*, 343 Or. 248, 170 P.3d 1049 (2007) (reprinted in the appendix to cert. pet. at App. 1 to App. 46).

JURISDICTION

The Oregon Supreme Court issued its opinion on October 11, 2007. The state timely filed its petition for writ of certiorari on January 4, 2008. This Court granted the petition on March 17, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATE STATUTORY PROVISION INVOLVED

Or. Rev. Stat. § 137.123 identifies the circumstances under which a trial court may impose consecutive sentences:

> (1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.
>
> (2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.
>
> (3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for

the new crime be consecutive to the sentence for the previous crime.

(4) When a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was

caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

STATEMENT

This case presents a question about the scope of the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). In those cases, this Court construed the Sixth Amendment jury-trial guarantee to apply to any factual findings—other than the fact of a prior conviction—that increase the maximum punishment authorized for a discrete criminal offense. The question in this case is whether that rule applies to facts that do not increase the sentence that a defendant receives for any individual crime, but determine only whether the penalties imposed for separate crimes will be served concurrently or consecutively.

1. The underlying facts and convictions

Respondent managed an apartment complex where the 11-year-old victim lived with her mother and her younger brother. *Ice*, 343 Or. at 250. Respondent twice entered the family's apartment, entered the victim's bedroom, and touched her breasts and then her vagina. *Id.* The state indicted respondent on six charges. J.A. 1-4 (indictment). For each of the two incidents, the state charged respondent with first-degree burglary for entering the victim's apartment with the intent to commit sexual abuse, first-degree sexual abuse for touching the victim's breasts, and first-degree sexual abuse for touching the victim's va-

gina. *Id.* The jury convicted respondent of all six charges.

2. The sentencing proceeding

The parties submitted sentencing memoranda. J.A. 16-34. The state urged the sentencing court to impose consecutive sentences on the two burglary convictions, based on the fact that those offenses arose out of two separate criminal episodes. J.A. 27-28, 30; *see* Or. Rev. Stat. § 137.123(2). For each of the two criminal episodes, the state urged the court to impose the sentence for sexual abuse based on touching the victim's vagina consecutively to the sentence on the burglary conviction. J.A. 28-32; *see* Or. Rev. Stat. § 137.123(4) and (5). The state recommended that the sentences for sexual abuse based on respondent's acts of touching the victim's breasts run concurrently with the sentences for sexual abuse based on his acts of touching the victim's vagina. J.A. 31-32.

Respondent initially pressed only a state constitutional argument about whether the two sexual-abuse convictions within each episode should merge for sentencing. J.A. 19-20. Prior to the sentencing proceeding, however, this Court decided *Apprendi*, and respondent then filed a supplemental memorandum bringing that decision to the sentencing court's attention. Respondent broadly asserted that "it is the province of the jury to determine which facts constitute a crime, and the jury must also consider any factors which may result in a sentence more severe than contemplated by statute." J.A. 33.

The sentencing court agreed with the state's sentencing recommendations and imposed sentences accordingly. J.A. 39-41 (sentencing transcript), 46-87 (judgment). Or. Rev. Stat. § 137.123 directs that multiple sentences be served concurrently unless the judge: (1) finds that the offenses were not committed in the same course of conduct; or (2) if the offenses were committed in the same course of conduct, find either that one offense was not incidental to the other or that the two offenses resulted in separate harms. The sentencing court "found that the convictions for the two burglaries (and the attendant sexual abuse convictions) arose out of 'separate incident[s]' and, thus, did not 'arise from the same continuous and uninterrupted course of conduct.'" *Ice*, 343 Or. at 255 (quoting Or. Rev. Stat. § 137.123(2)); J.A. 40. That finding permitted the sentencing court to impose consecutive sentences on the two burglary convictions. *Ice*, 343 Or. at 255.

The sentencing court also "implicitly found that the three offenses (the burglary and the two instances of sexual abuse) that occurred during each burglary arose out of a 'continuous and uninterrupted course of conduct.'" 343 Or. at 255-56 (quoting Or. Rev. Stat. § 137.123(4); footnote omitted). To impose consecutive sentences on the burglary and sexual abuse convictions, the sentencing court found that the convictions for burglary and sexual abuse reflected a "'willingness to commit more than one criminal offense'" and, alternatively, that the two offenses "'caused * * * greater or qualitatively different loss, injury or harm to the victim.'" *Id.* at 256 (quoting Or. Rev. Stat. §

137.123(5)(a) and (b)). Based on those factual findings, the sentencing court imposed consecutive sentences on the two burglary convictions (80 months and 90 months), consecutive sentences on each conviction for sexual abuse based on touching the victim's vagina (80 months and 90 months), and concurrent sentences for the remaining two sexual-abuse convictions based on touching the victim's breasts (75 months and 75 months), for a total of 340 months. J.A. 46-87.

3. The Oregon Court of Appeals affirmed without opinion.

Respondent appealed and the Oregon Court of Appeals affirmed without a written opinion. *State v. Ice*, 178 Or. App. 415, 39 P.3d 291 (2001).

4. The Oregon Supreme Court reversed, holding that the imposition of consecutive sentences based on judicial factfinding violated respondent's Sixth Amendment rights.

The Oregon Supreme Court granted respondent's petition for discretionary review to address his challenges to the consecutive sentences, along with his challenges to upward-departure sentences that the sentencing court also had imposed on four of the six convictions. The court declined to consider respondent's unpreserved challenges to the upward-departure sentences. *Ice*, 343 Or. at 253-54. On the consecutive-sentencing issue, the court first addressed respondent's arguments under the state constitution, which contains a jury-trial guarantee that applies only to "elements" of the crime. *Id.* at 257-60

(discussing caselaw). The court rejected respondent's state constitutional argument because the consecutive-sentencing findings could not be deemed elements of any specific crime. *Id.* at 260-62. Rather, those factual findings "involve a comparison between *two* crimes for which defendant is to be punished[.]" *Id.* at 261 (emphasis in original). On this point, the court was unanimous.

Turning to the federal constitution, however, the court divided 5-2. The state argued that the rule from *Apprendi* and *Blakely* applies only to factual findings that increase the "statutory maximum" punishment for a discrete criminal offense and does not apply to the manner in which sentences for multiple crimes are to be served. The Oregon Supreme Court rejected this argument. In determining the scope of *Apprendi*, the Oregon Supreme Court focused on this Court's statement that "'the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a *greater punishment* than that authorized by the jury's guilty verdict.'" *Ice*, 343 Or. at 265 (quoting *Apprendi*, 530 U.S. at 494) (emphasis added by Oregon Supreme Court). The Oregon Supreme Court concluded that that was the overarching principle to be gleaned from *Apprendi* and *Blakely*. The court then extended that "greater punishment" principle to *every* sentencing determination that results in a longer total sentencing package based on judicial factfinding, including facts that simply determine whether separate sentences for distinct criminal offenses should be served consecutively or concurrently. *Ice*, 343 Or. at 265-67.

The Oregon Supreme Court thus extended this Court's precedents to apply to judicial factfinding that increases a defendant's aggregate punishment, even if that factfinding does not enhance a specific sentence for a specific conviction. "The *Apprendi*, *Blakely*, and [*United States v.*] *Booker*[, 543 U.S. 220 (2005),] decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage in an adamantine refusal to get the message." *Ice*, 343 Or. at 266 (footnote omitted).

The dissent examined the specific issue before this Court in the *Apprendi* line of cases and derived a much narrower set of principles that cannot apply to aggregate sentencing determinations. *Id.* at 269-70 (Kistler, J., dissenting). Because, in each of those cases, this Court was concerned only with identifying the constitutional bounds on defining the elements of a specific offense, the dissent stressed that this Court's references to "greater punishment" could apply only in the context of a discrete conviction and sentence. *Id.*

SUMMARY OF ARGUMENT

In the *Apprendi* and *Blakely* line of cases, this Court shored up the Sixth Amendment jury-trial guarantee by restricting the legislative encroachment on the jury's traditional role of determining whether the government has proved each element of an offense beyond a reasonable doubt. The Oregon Supreme Court mistook the sweeping impact of those cases for a sweeping pronouncement about the role of the jury in deciding all facts related in any way to the

severity of sentencing, including the aggregate sentencing package. Specifically, the state court held that *Apprendi* extends to findings that authorize consecutive sentences because the imposition of consecutive sentences increases the aggregate penalty. But this Court's decisions are grounded in the historic jury function—determining whether the government has proved each element of an offense beyond a reasonable doubt—and have not been applied outside that offense-specific history.

To remain faithful to this Court's reasoning, any expansion of the Sixth Amendment jury-trial guarantee must rest on a similar historic foundation. But the substantial historical record delineating the jury's traditional role in finding each element of an offense stands in stark contrast to the absence of any history suggesting that juries traditionally played a role in imposing multiple punishments for multiple convictions. The former role is well established given that the framers' overriding concern in twice providing for a constitutional guarantee of the jury-trial right was to preserve the jury's role in determining guilt. The latter was a practice apparently unknown to the framers because the jury historically played no role in aggregate sentencing determinations.

The framers of the constitutional jury-trial guarantees would have been quite comfortable with the trial judge in this case deciding how respondent would serve separate sentences for separate convictions. And they would have viewed the effect of consecutive sentencing not as enhancing respondent's punishment in a way that called for additional jury

protections, but as merely giving meaning to the jury's determination that multiple convictions—each calling for its own sentence—were warranted. Because the jury traditionally played no role in aggregate sentencing, Oregon's consecutive-sentencing statute—which authorizes the consecutive sentences in this case based on judicial factfinding—does not encroach on the Sixth Amendment's jury-trial guarantee.

ARGUMENT

A. The Oregon Supreme Court misread this Court's precedent. The *Apprendi* rule provides an objective means for determining the constitutionally protected elements of a specific offense.

Whenever a criminal defendant is convicted of multiple offenses—either in a single proceeding or in separate proceedings—the decision must be made whether the sentences for those multiple offenses will be served consecutively or concurrently. In Oregon, as in most states, the trial judge makes that decision. The judge's role in determining how a criminal defendant will serve multiple sentences for multiple convictions is "[f]irmly rooted in common law." Arthur W. Campbell, LAW OF SENTENCING, § 9.12, 278 (2nd ed. 1991). And it is a firmly rooted tradition in Oregon, where trial judges have long had inherent authority to impose consecutive sentences. *See State v. Jones*, 250 Or. 59, 61, 440 P.2d 371 (1968) ("it is an inherent power of the court to impose sentences, including the choice of concurrent or consecutive terms, when the

occasion demands it"). But Oregon, like many other states, has codified the trial judge's authority to impose consecutive sentences and has constrained that authority in some respects by requiring the judge to make certain factual findings to impose some consecutive sentences. Or. Rev. Stat. § 137.123.

In this case, the Oregon Supreme Court evaluated that statutory requirement of factual findings for consecutive sentences in light of this Court's recent Sixth Amendment jury-trial cases. From its review of those cases, the Oregon Supreme Court concluded that the Sixth Amendment limits the State's ability to require judicial factfinding as a sentencing predicate, not only when the fact authorizes an enhanced sentence for a specific conviction, but also when the fact authorizes a greater total sentencing package than would otherwise be permitted. Under Oregon law, the jury makes every factual finding necessary for each conviction and the sentence on each separate conviction is fully supported by the jury's finding of guilt. The Oregon Supreme Court nevertheless held that the *Apprendi* rule entitles a defendant to a jury determination on facts required to impose separate, but consecutive, sentences on those separate convictions.

That holding is not compelled by anything in the *Apprendi* line of cases. None of those cases purports to address consecutive sentencing or the aggregate punishment for multiple crimes. In both *Apprendi* and *Blakely*, this Court addressed a narrow question—the validity of an individual sentence that exceeded the statutory maximum for a single offense.

The only discussion about consecutive sentences in *Apprendi* suggests that the *Apprendi* rule does not extend to that determination. The Court began by explaining that the narrow issue involved a particular sentence for a particular offense on a particular count and that the fact that the defendant's sentence fell within the authorized *aggregate* maximum (that could be imposed via consecutive sentences) was irrelevant. *Apprendi*, 530 U.S. at 474.

The Oregon Supreme Court misapplied this Court's precedent by extending it to the consecutive-sentencing context. A close examination of this Court's cases reveals that the pertinent animating principles apply much more narrowly, and apply only to decisions involving a single offense and to the sentence that may be imposed for it. Starting in the 1970s, this Court addressed a legislative trend of transforming the jury's traditional function of determining all the facts necessary for a conviction. By recasting some of those factual determinations as presumptions or as sentencing factors instead of elements of the offense, some legislatures attempted to diminish the jury's traditional role. Through the use of presumptions, the legislatures shifted the burden to prove certain facts to the jury from the government to the defendant. With sentencing factors, legislatures shifted certain factfinding from the jury to the trial judge. In both situations, the jury no longer stood between the defendant and the government to the same extent, and it no longer served its historic role of deciding whether the government had proved each fact necessary for a conviction beyond a reason-

able doubt. In the *Apprendi* and *Blakely* line of cases, this Court articulated constitutional limits on the state's ability to make that shift and established an objective test for identifying the elements of an offense that must be determined by the jury.

Although States are free to define criminal offenses, the elements of those offenses, and the punishment associated with each offense, the Sixth Amendment limits the extent to which States may shift certain factual determinations away from the jury. Any factual determination (other than recidivism) that exposes a defendant to a greater maximum punishment for a conviction for a specific offense must be made by the jury, as was the case when the framers drafted the jury-trial guarantees. But the applicable constitutional rule is tethered to the jury-trial right and is offense-specific. It does not extend to a factual determination that is not functionally an element of a specific offense and that was never within the jury's historic role.

1. The pre-*Apprendi* cases established an open-ended, multi-factor test to determine the constitutional elements of a discrete offense that cannot be removed from the jury's consideration. They provide no basis for extending the jury-trial guarantees to factfinding necessary for consecutive-sentencing.

A useful starting point is *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which this Court has identified as initially recognizing the problem it addressed in the

Apprendi line of cases. *Apprendi*, 530 U.S. at 484. In *Mullaney*, the Court struck down a Maine law that shifted the burden on the element of malice from the prosecution to the defendant, through the use of a presumption. *Mullaney*, 421 U.S. at 688. In doing so, this Court applied its holding from *In re Winship*, 397 U.S. 358, 364 (1970), that due process requires the prosecution to establish beyond a reasonable doubt all facts necessary to constitute the crime. Notwithstanding the considerable deference owed to policy choices made by State legislatures in defining the elements of crimes, the Court ruled that the presumption at issue violated the Constitution. To rule otherwise would permit the States to evade the historical protections addressed in *Winship* by shifting a traditional element of an offense from the prosecution to the defendant. *Mullaney*, 421 U.S. at 699. The Court's discussion and holding apply only to offense-specific factual determinations because of the historical foundation on which they are based (*i.e.*, the due process requirement of proving each element of a crime beyond a reasonable doubt).

But the Court refused to extend *Winship* and *Mullaney* to invalidate affirmative defenses. In *Patterson v. New York*, 432 U.S. 197 (1977), the defendant argued that with affirmative defenses, as with presumptions, the legislature shifts the prosecutor's burden to the defendant and impermissibly eliminates the jury's role in determining whether the government has proved a particular fact beyond a reasonable doubt. Again, the Court acknowledged that it is the state legislature's prerogative to define the

elements of a crime and to prescribe the penalties for that crime. Yet so long as the State does not offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," shifting the burden for proving a fact from the prosecution to the defendant does not create due process concerns. *Id.* at 202. A defendant may be required to prove affirmative defenses because they do not involve facts necessary to constitute the crime—*viz.*, they are not elements of the crime—which the prosecution must prove to the jury beyond a reasonable doubt. *Id.* at 206. The Court cautioned that State legislatures, while permitted to reallocate some elements of crimes as affirmative defenses, were not entirely free of constitutional restraints in that regard. *Id.* at 210. But beyond the obvious limitation that legislatures cannot declare a person guilty or presumptively guilty, the Court offered little clarification about what those constitutional restrictions were. *Id.* Again, the applicable constitutional rule is offense specific and focuses on identifying the correct demarcation between factual findings that are constitutional elements of an offense that a jury must find beyond a reasonable doubt and facts that can be shifted away from the traditional jury determination. *See also Martin v. Ohio*, 480 U.S. 228 (1987) (upholding Ohio statute that placed the burden of proving self-defense on the defendant).

The Court next addressed the line dividing elements of an offense—which the state must prove to a jury beyond a reasonable doubt—from non-element "sentencing factors" in *McMillan v. Pennsylvania*, 477

U.S. 79 (1986), and in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In each case, the challenged law provided that the sentencing range for a specific offense hinged on facts that the trial judge would find by a preponderance of the evidence. *McMillan* involved a factual finding (visible possession of a weapon during a crime) that triggered a mandatory minimum sentence, whereas *Almendarez-Torres* involved a factual finding (the existence of a prior felony conviction) that increased the statutory maximum sentence. In each case, the issue before this Court was whether the factual finding at issue was a constitutional element of the offense or whether it merely constituted a "sentencing factor" that fell outside the jury-trial guarantee.

To resolve that issue, this Court crafted a loose multi-factor test, which asked, among other things, whether the statute declared the defendant presumptively guilty of a crime or relieved the prosecution of its burden of proving guilt, whether proof of the sentencing factor could increase the defendant's sentence for that crime "from a nominal fine to a mandatory life sentence," whether the sentencing factor altered the maximum penalty for the offense, whether the statute "creat[ed] a separate offense calling for a separate penalty," and whether the provision gave the "impression of having been tailored to permit [the sentencing factor] to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 86-88 (identifying those factors; internal citations omitted); *see also Almendarez-Torres*, 523 U.S. at 242-43 (same). Applying that test, this Court held that the

factual findings at issue in *McMillan* and *Almendarez-Torres* were not constitutional elements of the offenses. Therefore, shifting those factual findings away from the jury to the trial judge did not violate the constitution.

The analysis and holdings in *McMillan* and *Almendarez-Torres* demonstrated that the proper constitutional inquiry is offense-specific—that is, focused on analysis of the particular individual offense for which a sentence is being contemplated. In *McMillan*, the Court noted that the State statute did not alter the definitions of any of the individual offenses. Instead, the legislature "took one factor that has always been considered by sentencing courts to bear on punishment—the instrumentality used in committing a violent felony—and dictated the precise weight to be given that factor if the instrumentality is a firearm." *McMillan*, 477 U.S. at 89-90. The state's "decision to do so has not transformed against its will a sentencing factor into an 'element' of some hypothetical 'offense.'" *Id.* at 90. And because the state was permitted to treat the factor "as a sentencing consideration and not an element of any offense," the Court rejected the defendants' Sixth Amendment challenge in short order. "[W]e need only note that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *Id.* at 93 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).

Similarly, in *Almendarez-Torres*, the Court framed the issue as whether the sentencing provision defined "a separate crime or simply authorize[d] an enhanced penalty." 523 U.S. at 226. The Court held that the re-

cidivist penalty provision did not define a separate crime. *Id.* Again, the Court's historical analysis makes clear that the Court's concern was with the elements of the discrete offense at issue and with whether the recidivism finding triggered a penalty in excess of the statutory maximum penalty that otherwise would apply to that particular offense. *Id.* at 244-45. The dissent, foreshadowing the wording used in *Apprendi* and *Blakely*, also framed the constitutional inquiry in offense-specific terms,—"whether the Constitution requires a fact which substantially increases the maximum permissible punishment for a crime to be treated as an element of that crime—to be charged in the indictment, and found beyond a reasonable doubt by a jury." *Id.* at 248 (Scalia, J., dissenting).

The Court's decision in *Jones v. United States*, 526 U.S. 227 (1999), even more directly portended the *Apprendi* rule and maintained the offense-specific focus for the Sixth Amendment question. There, in the course of construing a federal statute, the Court focused narrowly on the jury's role in determining guilt and "whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244. Based on "the history bearing on the Framers' understanding of the Sixth Amendment," the Court stated the principle that was to become the *Apprendi* rule: "under the * * * Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a

crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n. 6, 244. In *Jones* as well, the Court was concerned with preserving the jury's role in determining guilt, and with preventing legislatures from impermissibly transforming the elements of a crime into "sentencing factors" found by trial judges rather than by juries. *Id.* at 241-44.

2. *Apprendi* and *Blakely* replaced the prior test with an objective test for determining the constitutional elements of an offense that fall within the jury-trial guarantee, but suggested no broader constitutional limits on judicial factfinding for consecutive sentences.

In *Apprendi*, this Court jettisoned the multi-factor test and adopted a bright-line test to determine whether a fact that bears on sentencing is, for constitutional purposes, an element of the underlying crime. The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The Court did so, in part, to avoid the subjectivity inherent in the open-ended multi-factor test that it had been applying. Under that multi-factor test, "legislatures may establish legally essential sentencing factors *within limits*" but "the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge." *Blakely*, 542 U.S. at 307

(emphasis in original). "The subjectivity of this standard is obvious." *Id.*

In eliminating that subjectivity, this Court did not extend the Sixth Amendment jury-trial guarantee to anything other than factual determinations that a jury must make in deciding a defendant's guilt for a specific offense. The Court established a bright-line rule, but one that applies only to those facts historically found by the jury as part of the guilt determination—in other words, one that applies only to the elements of an offense. As Justice Kistler explained in dissent below, "[f]ar from seeking to require juries to decide beyond a reasonable doubt every fact that affects sentencing, the rule in *Apprendi* serves only to provide a nonsubjective means of determining when the legislature's efforts to redefine the elements of a single offense will stay within constitutional bounds." *Ice*, 343 Or. at 272 (Kistler, J., dissenting).

Under *Apprendi*, the Sixth Amendment jury-trial guarantee necessarily is limited to determinations that pertain to a specific offense and the sentence associated with it. *Apprendi* focused on the constitutional limitations that prohibit a legislature, with respect to a specific offense, from shifting the determination of an element from the jury to the sentencing judge. If this shift creates, in effect, a new aggravated offense, it usurps the jury's traditional role of determining the defendant's guilt. *Apprendi*, 530 U.S. at 477-79. Although trial practices are not locked into what existed in 1787 and may evolve over time, "practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all

facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt." *Id.* at 483-84. Under the *Apprendi* rule, the legislature is deemed to have created the functional equivalent of a "greater" offense, with an additional element, when it provides that a factual finding made at sentencing authorizes a punishment in excess of the statutory maximum that would otherwise be available for the offense. *Id.* at 494 n. 19; *see also id.* at 483 n. 10 ("facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense").

Apprendi is grounded in the jury's historic role in determining whether the government has proved the elements necessary for a specific conviction and in thereby authorizing punishment within the range established for that particular conviction based on those factual determinations:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.

Id. at 484.

Although general references to punishment appear in the Court's discussion, the Oregon Supreme Court erred by applying those generally worded passages as broadly as it did. The state court instead should have recognized that this Court's discussion focused entirely on the punishment authorized by the jury's determination of the elements of a specific offense. For example, in reiterating the holding of *McMillan*, the *Apprendi* Court noted that it had not budged "from the position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute *a criminal offense*, and (2) that a state scheme that keeps from the jury facts that 'expose [defendants] to greater or additional punishment,' may raise serious constitutional concerns." *Apprendi*, 530 U.S. at 486 (emphasis added; citations to *McMillan* omitted).

In *Blakely*, as well, the Court maintained that same narrow focus on the elements required to define a crime. There, the Court characterized the rule from *Apprendi* as reflecting

> two long-standing tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is * * * no accusation with

> the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1892).

Blakely, 542 U.S. at 301-02 (footnote omitted).

Once again, the Court emphasized the constitutional limits on legislative attempts to recast a factual element of a crime as a sentencing factor. Although the Courts' members disagreed about where to draw the line, nothing in the Court's discussion encompassed additional issues or suggested a broader application of the Sixth Amendment jury-trial guarantee. *See id.*, 542 U.S. at 302 n. 6 ("It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or [Justice O'Connor's], the Constitution draws.").

In other words, this Court consistently has stated that the Sixth Amendment does not cover all aspects of punishment for criminal convictions. It prohibits interference with the role the jury historically played—that is, with its role in determining whether the elements of the criminal offense have been proved and with its role in setting the stage—by returning a guilty verdict—for the imposition of a punishment within the maximum sentence associated with that verdict. As the Court noted in discussing indeterminate sentencing, while that aspect of sentencing may involve judicial factfinding, "the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar

as judicial impingement upon the traditional role of the jury is concerned." *Id.* at 309 (emphasis in original).

Finally, it is worth noting that this Court expressly declined to consider consecutive sentencing and the aggregate punishment for multiple crimes in *Apprendi*. The Court explained that the narrow issue involved a particular sentence for a particular offense on a particular count. *Apprendi*, 530 U.S. at 474. And the Court deemed irrelevant the fact that the defendant's sentence fell within the authorized *aggregate* maximum and the argument that a judge could have imposed a consecutive sentence on two other counts to reach the same sentence imposed on the single count at issue. *Id.* "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* This Court considered the sentences on the other counts as having "no more relevance to our disposition than the dismissal of the remaining 18 counts." *Id.*

Thus, nothing in *Apprendi* and *Blakely* supports the Oregon Supreme Court's broad conclusion that the principles addressed in those cases apply to *any fact* that exposes a criminal defendant to greater punishment and that they apply even to punishment that does not take the form of an enhanced sentence for a specific offense.

3. This Court has never extended the *Apprendi* rule beyond its offense-specific context; rather, it has reaffirmed that the rule is focused on the jury's historic role in finding each element of a specific offense.

The Court's own characterization of *Apprendi* and *Blakely* resolves any doubt that the Court's narrow focus has been solely on the jury's historic role in deciding each element of a specific offense. In *Booker*, 543 U.S. at 230, the Court summarized the line of cases discussed by repeatedly referring to proof of the facts or elements establishing *the* crime at issue:

> It has been settled throughout our history that the Constitution protects every criminal defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995). These basic precepts, firmly rooted in the common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures.

The Court placed the line of cases from *McMillan* forward in the context of the "new trend in the legis-

lative regulation of sentencing" whereby legislatures transformed an element of the offense into a sentencing factor that authorized a heavier sentence "for the underlying crime." 543 U.S. at 236. The Court noted that, "[a]s the enhancements became greater, the jury's finding of the underlying crime became less significant." *Id.* And it was that shift that led to this Court's decisions.

> The new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.

Id. at 237. In articulating "the principles [the Court] sought to vindicate" in these cases, the Court returned to "the threat of 'judicial despotism' that could arise from 'arbitrary punishments upon arbitrary convictions' without the benefit of a jury in criminal cases" and the jury's role in determining the elements for a conviction. *Id.* at 238-39.

4. The Oregon Supreme Court failed to appreciate the narrow focus of this Court's cases on preserving the jury's historic role in determining each element of a specific offense.

Although this Court has, at times, spoken in broad terms of "punishment," it always has maintained its focus on the jury's historic role in establishing the elements of the offense, which, in turn, establishes the permissible sentencing range for that specific offense. The *Apprendi* line of cases does not support the Oregon Supreme Court's expansive holding that any fact that increases the aggregate penalty for multiple convictions must be found by a jury. Far from establishing that broad principle, this Court's caselaw has consistently confirmed that the focus is on the jury's historic role—protected by the Sixth Amendment jury-trial guarantee—of determining each element of an offense. Because of the nature of that historic role, this Court's cases focus solely on the elements of the individual offense. They forbid the legislature from transforming "elements" into "sentencing factors" and from depriving a defendant of the right to have a jury find the required elements of an offense beyond a reasonable doubt. Once the conviction for the offense is properly established, setting the stage for imposition of punishment within the range defined for that conviction and justified by the jury's factual findings, the Constitution does not mandate that the jury play a further role.

B. The jury historically had no role in imposing multiple punishments for multiple convictions; that decision was made by the trial court.

In the end, the cases on which the Oregon Supreme Court relied do provide guidance in answering the question presented in this case. To determine whether the Oregon consecutive-sentencing statute violates the Sixth Amendment jury-trial guarantee by requiring certain judicial factfinding, this Court must examine the historic role of the jury and whether the Constitution's framers would have viewed the jury as playing a critical role in imposing multiple sentences. The history provides no support for viewing the consecutive-sentencing factfinding as within the jury's role. Nothing in the Constitution's text or in the general history surrounding the adoption of the constitutional jury-trial guarantees suggests that the framers intended to protect a role for the jury in the decision whether and how to impose multiple punishments for multiple convictions. Indeed, there was no such role to protect. In both England and America, the jury's role was limited to determining the elements of a specific offense and weighing the criminal defendant's guilt for that specific offense. History demonstrates that the decision to impose multiple punishments has always been understood as a judicial function and not as a jury function. Juries traditionally have played no role in consecutive sentencing, and the historical presumption has been that, when a defendant is convicted of separate offenses, he is subject to a separate penalty for each offense.

1. Neither the text nor general history surrounding the adoption of the jury-trial guarantees suggests an intent to require juries to play a role in deciding how to impose multiple punishments for multiple convictions.

The right to a jury trial for criminal offenses appears in two places in the United States Constitution. Article III, section 2, provides that "the trial of all crimes, except in cases of impeachment, shall be by jury." The Sixth Amendment clarifies that guarantee and provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Although the Sixth Amendment uses the phrase "criminal prosecutions," as opposed to Article III's reference to "crimes," this Court has long since rejected the argument that "the amendment was intended to supplant that part of the third article which relates to trial by jury." *Callan v. Wilson*, 127 U.S. 540, 549 (1888). "The Sixth Amendment * * * is not to be regarded as modifying or altering [the Article III jury-trial guarantee] * * * [and] fairly may be regarded as reflecting the meaning of the former" and as "mean[ing] substantially the same thing." *Patton v. United States*, 281 U.S. 276, 298 (1930). Article III provides that jury trials will be conducted "according to the settled rules of the common law" and the "enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions is to be taken as

a declaration of what the rules were." *Callan*, 127 U.S. at 549.

The Sixth Amendment jury-trial guarantee was a response to objections to the lack of specificity as to the nature of the jury-trial right guaranteed in Article III. *See* Francis H. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: A STUDY IN CONSTITUTIONAL DEVELOPMENT 25-28 (Kansas 1951) (discussing objections); Frankfurter and Corcoran, PETTY FEDERAL OFFENSES AND THE CONSTITUTIONAL GUARANTEE OF TRIAL BY JURY, 39 Harv. L. Rev. 917, 970-71 (1926) (same); *Schick v. United States*, 195 U.S. 65, 78 (1904) (Harlan, J., dissenting) (same). Hence, the Sixth Amendment "dealt with well-defined incidents of a jury trial, which were spelt out in detail and not trusted to the implications of Article III." Frankfurter and Corcoran, 39 Harv. L. Rev. at 970. The historical record demonstrates that, in this context, the term "prosecution" was interchangeable with the word "crime." *See id.* at 971-75 (detailing history on that point). Thus, the text of the Sixth Amendment, rather than expanding a jury-trial guarantee to encompass all aspects of criminal prosecutions, simply "enumerates the elements of 'trial by jury' in Article III" and "does not extend the field of its operation." *Id.* at 971. The text of the jury-trial guarantee is focused narrowly on protecting the jury's role in the prosecution of a specific offense.

The history surrounding the constitutional jury-trial guarantees also demonstrates that the framers intended merely to protect the jury's role in establishing a criminal defendant's guilt for a specific offense.

As this Court repeatedly has recognized, the Sixth Amendment jury-trial guarantee was largely crafted as a shield for the criminal defendant against arbitrary judges, trusting instead the power of the defendant's peers to determine guilt. The jury provided "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

At the same time, the Sixth Amendment was motivated by what was seen as tension "between judge and jury over the real significance of their respective roles." *Jones*, 526 U.S. at 245. In England, as the jury liberally exercised its power, Parliament began to restrict it. "This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part. 4 Blackstone 238-39." *Jones*, 526 U.S. at 245. This assertion of jury power led to statutory enactments barring the right to a jury trial for new statutory offenses. *Id.* That legislative practice of eliminating the jury's role "was one of the occasions for the protest in the Declaration of Independence against deprivation of the benefit of jury trial" and led to the creation of the constitutional jury-trial guarantee. *Id.* at 246.

This Court has described the jury-trial right in offense-specific terms—that is, as focused on the jury's role in determining whether the defendant committed a particular offense with which he is charged—in

numerous other cases. For example, in *Williams v. Florida*, 399 U.S. 78, 100 (1970), the Court explained that "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." In striking down a five-person jury, the Court again described the jury-trial guarantee in terms of the jury role in assessing the defendant's guilt for a specific offense. *Ballew v. Georgia*, 435 U.S. 223 (1978); *see also Burch v. Louisiana*, 441 U.S. 130 (1979) (again addressing the jury-trial guarantee in terms of the jury's role in determining guilt for a specific offense). And in *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993), the Court stated that the jury-trial right includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty,'" and held that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." In *Gaudin*, 515 U.S. at 510-11, the Court explained that "[t]he right to have a jury make the ultimate determination of guilt has an impressive pedigree"—pointing to Blackstone's and Justice Story's commentary on the matter—and stated the basic principle that "[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged."

In short, this Court's analysis consistently has emphasized and focused on the jury function of de-

termining the defendant's guilt or innocence. Nothing in the Constitution's text, or in the general history behind the Sixth Amendment jury-trial guarantee, suggests that the framers intended the right to extend to decisions about whether or how to impose multiple punishments for multiple convictions.

2. English case law establishes that the jury played no role in imposing multiple sentences for multiple convictions.

Questions surrounding the imposition of multiple sentences for multiple felony convictions did not arise often in England prior to 1787 because the punishment for most felony convictions was death. *See* 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 18-19 (1769) (discussing "melancholy truth" that English law prescribed the death penalty for no fewer than 160 crimes). And when sentence of death was pronounced, the immediate consequence under the common law was attainder, which led to forfeiture of property and corruption of blood. 4 Blackstone 373-82. A defendant convicted of one felony could plead *autrefois attaint* for subsequent felony charges. *See* 1 Joseph Chitty, A PRACTICAL TREATISE ON THE CRIMINAL LAW 464 (1816) (describing the plea as founded upon the principle that "once a felon is attainted he is dead in law, his whole possessions are forfeited, his blood is corrupted, and nothing remains but to put in execution the sentence of death under which he continues, so that any second attainder would be superfluous") (footnote omitted). The consequences that flowed from a single felony conviction generally made subsequent prosecutions superfluous.

The use of lengthy imprisonment as a punishment would not become widespread in England until the early nineteenth century. J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed. 1990). But cumulative punishments for felonies were not unknown. *See* M. Newark, A. Samuels, S. White, *Sentencing the Multiple Offender: Concurrent and Consecutive Sentences*, 23 N. I. L. Q. 133, 134 (1972) (describing the practice of imposing cumulative punishments of hanging for one offense, being drawn for another, and quartered for a third).

Misdemeanors, however, were not subject to the same punishments or the plea of former attainder and courts could impose consecutive sentences for multiple misdemeanor convictions. The lead, pre-founding English case on the subject was the House of Lords' 1769 decision in *Rex v. Wilkes*, 19 How. St. Tr. 1075, 1132-36. Wilkes was convicted of two misdemeanor offenses and the court ordered him to serve 10-months imprisonment on the first offense and 12 months on the second offense, with the second imprisonment term commencing upon completion of the first. 19 How. St. Tr. at 1125-26. Wilkes appealed, raising the issue "whether a judgment of imprisonment against a Defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law?" *Id.* at 1127. Wilkes argued that the judgment was not valid because, although judgments were required to take effect immediately, the subsequent punishment would not take effect until the other pun-

ishment ended (which was an uncertain time). *Id.* at 1132.

The House of Lords held that the consecutive sentences were valid. *Id.* at 1127, 1132-36. The court distinguished trial courts' consecutive-sentencing authority for misdemeanors from that for felonies on the ground that the penalty for felonies was a sentence of death. *Id.* at 1133. "[B]ut in misdemeanors, where punishment is discretionary, the limitation, as to time, seems only to be, that the punishment shall take place before a total dismission of the party: a punishment shall not hang over a man's head when he has been once discharged." *Id.* "But whilst he remains under a state of punishment, whilst he is suffering one part of his punishment, he is very properly the object of a different kind of punishment to take place during the continuance of the former or immediately after the end of it." *Id.*

The court explained that it could not "explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, as is done in the present case." *Id.* And the court rejected the notion that the punishment for one offense "varied"—that is, unfairly influenced—the punishment for the other and stressed that the issue arose only because of the party's own guilt for the multiple offenses:

> *It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other*; but only provided, from the situation of the delinquent, *to effectuate the punish-*

> *ment the Court thought his crime deserved*. It is shaping the judgment to the peculiar circumstances of the case; and the necessity of postponing the commencement of the imprisonment under the second judgment, arises from the party's own guilt, which had subjected him to a present imprisonment; and therefore the question really is, Whether a man under a sentence of imprisonment for one offense, can be sentenced again for another offence?

Id. (emphasis added). The court concluded that a person under a sentence of imprisonment could be sentenced again for another offense, and that "this [was] the only form by which it can be done consistent with justice." *Id.* at 1134-36.

The House of Lords' *Wilkes* decision—a case frequently relied on by American courts—thus viewed the issue in simple terms. If a person is sentenced for two offenses, the timing of when the second sentence commences falls within the trial court's discretion, so long as the prisoner has not yet been discharged from the first sentence. Each offense carries its own penalty, and the imposition of a penalty for each offense does not "vary" the punishment for the other conviction. Rather, consecutive sentencing is simply the product of the fact that a person has committed, and been convicted of, multiple crimes. And it may be the only meaningful way to sentence a person to prison if that person was already imprisoned. *See also King v. Williams*, 1 Leach 529, 536 (1790) (reflecting the trial

judge's imposition of three consecutive sentences); *Rex v. Robinson*, 1 Mood. 413, 414 (1834) (reversing a judgment imposing a single sentence of two years imprisonment for two convictions and concluding that the trial judge should have imposed two consecutive sentences instead).

Judicial control over the kind of aggregate-sentencing decision at issue in this case also appears to be reflected in multiple sentences of transportation (or exile). In *King v. Bath*, 1 Leach 441 (1788), for example, the defendant was convicted of grand larceny and received a seven-year sentence of transportation from one court. That same year, he was convicted of a felony in a different court and the issue arose whether he could be sentenced a second time, given that he was already under sentence. The defendant ultimately received a seven-year sentence of transportation for the second conviction that ran from the time of the second conviction and, hence, would result in additional time beyond the first sentence. In his 1816 treatise on criminal law, the English legal commentator Joseph Chitty concluded that trial judges had authority to impose consecutive sentences of imprisonment and transportation, relying on *Rex v. Wilkes* and *King v. Bath*. 1 Chitty, at 718 (describing trial judges' discretion to impose consecutive terms of transportation and imprisonment "in their discretion"); *see also id.* at 800 (similarly describing trial judges' discretion to impose consecutive terms of imprisonment).

This clear authority for judges to impose consecutive sentences for multiple misdemeanor convictions

extended to felony convictions no later than 1827, when England expressly authorized judges to exercise the same discretion in sentencing multiple felony convictions. 7 & 8 Geo. 4, c. 28, s. 10. Under the statute, judges could impose consecutive sentences of imprisonment or transportation even when the aggregate sentence exceeded what otherwise could be imposed for any one conviction. *See* Archbold, PRACTICE, PLEADING AND EVIDENCE IN CRIMINAL CASES § 185-1 (1853) (the court may impose the consecutive sentence "although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded.").

The statute may have been unnecessary. In *Lee v. Walker*, [1985] Q.B. 1191 (1985), the court explained, "[a]s we see it, the position at common law was that before 1827 the court had no power to pass a sentence of imprisonment for felony because the sentence for felony was death, and therefore there was no occasion for passing consecutive sentences for felony." The court explained that *Wilkes'* reasoning is "directed throughout not to the form of the proceedings, but to the justice of the sentence and his conclusion is that the imposition of a consecutive sentence of imprisonment is the only form, consistent with justice, whereby a man who is imprisoned already for one offence can be properly punished for another offence, meriting imprisonment." *Id.* The court concluded "that the High Court has always had inherent jurisdiction to impose consecutive sentences of imprison-

ment in any appropriate case where the court had the power to imprison." *Id.*

In any event, the practice was unquestioningly accepted. In part, that acceptance turned on the concern that "right and justice require [that] when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence[.]" *Regina v. Cutbush*, 2 Q.B. 479, 10 Cox's Cr. Case 489 (1867) (Blackburn, J.) (noting that it had been the practice for judges to impose consecutive sentences for multiple felony convictions "so far as living judicial memory goes back").

The important points are these: Historically, the jury played no role at all in the decision to impose multiple punishments for multiple convictions in England. If consecutive sentences were to be imposed, it fell to the trial judge—and not to a jury—to make that determination. In that regard, English courts had taken the view that each offense authorized its own penalty, and that the imposition of a penalty for each offense did not "vary" the punishment for the other conviction. The necessity of postponing the commencement of the second term of imprisonment arose only because the defendant was guilty of multiple offenses.

For the sake of completeness, the State notes that, at common-law, the English jury *did* play a limited role in resolving certain "collateral issues" that would arise after sentencing, including claims of pregnancy

(which could delay the execution of a death sentence), insanity (a convicted person who became insane after the verdict should not have been executed), and "non-identity" or "diversity of person" (a claim that the person is not the same person who was attained). 4 Blackstone, 24-25, 387-89; *see also Nobles v. Georgia*, 168 U.S. 398 (1897) (concluding that, at common law, use of jury to determine post-verdict claim of insanity was one mode of resolving that issue but was not required). But nothing in that history suggests that English common law required juries to make the consecutive-sentencing determinations or to decide when multiple sentences commenced in relation to each other. Instead, the historical record on consecutive sentencing points squarely in the opposite direction.

Moreover, whatever the contours of the common-law English jury's role, the American jury generally has not been responsible for the myriad of "downstream" factual determinations that can arise after sentence is imposed, including in the probation, prison and parole settings. Nothing in the *Apprendi* rule would establish otherwise. *See Meachum v. Fano*, 427 U.S. 215, 224 (1976) ("given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him"); *Johnson v. United States*, 529 U.S. 694 (2000) (attributing penalties for revocation of supervised release condition to original conviction).

The historical record demonstrates that, at the time of the Constitution's founding and into the 1800s, English common law entitled trial judges to impose cumulative sentences for separate convictions,

barring a prior death sentence that would have rendered any additional punishment superfluous. Under English common law, the jury played no role in the kind of decision at issue in this case.

3. Early American cases similarly assume the trial judge's authority to impose consecutive sentences, with no jury role in the decision.

At the time of the founding, the punishment for most felony convictions in the colonies was death. Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 48, 77-82 (1993); Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 Stan. L. Rev. 839, 842 (1999). The use of lengthy imprisonment as a punishment was in its infancy in America and would not become widespread until the early nineteenth century. *Id.* at 151-52. Consequently, as was the case in England, questions about the imposition of multiple sentences for multiple convictions arose infrequently in the years surrounding 1787. When questions about multiple sentences did arise, the questions largely were related to issues of joinder and merger. Nonetheless, the pertinent history demonstrates that the discretion to sentence for multiple convictions remained entirely with the trial judge, and that the jury played no part in the imposition of those multiple sentences. Many appellate courts were sharply critical of challenges to the judge's ability to impose consecutive sentences, and they often noted that consecutive sentences were the

only way to give meaning to a jury's finding of guilt on the multiple convictions.

The majority view in the early American jurisprudence was that trial judges had discretionary authority to impose consecutive sentences. The Virginia Supreme Court recognized that principle as early as 1806 in *Commonwealth v. Leath*, 3 Va. 151 (1806). In *Leath*, the defendants had been sentenced for a felony conviction and subsequently convicted of additional felonies. *Id.* at 151-52. They asserted that, because they already had been sentenced to prison on the prior conviction, they could not be sentenced for the subsequent convictions, arguing that "no law of the land allows a man convicted, to be sentenced to undergo punishment at a far distant day, after he shall have undergone punishment in the meantime, for an offense of the like, or of a different kind." *Id.* at 152. The court rejected that claim, holding that the trial judge could impose prison for the subsequent convictions, even though the defendants already were serving a sentence of imprisonment, and holding that "each imprisonment ought to commence from and after the expiration of the imprisonment or imprisonments which may have been adjudged against them before the rendition of such judgments respectively." *Id.* at 154-55.

In 1811, the Connecticut Supreme Court reached the same result in *Connecticut v. Smith*, 5 Day 175, 179 (1811), confirming what had "been the usage of our courts, for many years past, in this state"—that the sentencing judge possessed authority to impose consecutive sentences for multiple convictions. The

court recognized the sentencing court's discretionary authority to postpone the commencement of an imprisonment term for an offense until the expiration of an imprisonment term for another offense, explaining that such authority "prevent[s] the previous conviction from operating as an exemption from punishment, for a subsequent offence." *Id.*

The Pennsylvania Supreme Court in 1822 similarly upheld a trial judge's discretionary authority to impose consecutive sentences and observed that it had long been "the common practice in the Courts of this State." *Russell v. Commonwealth*, 7 Serg. & Rawle 489, 490 (1822). The court explained that imposing a term of "imprisonment to commence at a future time * * * [was] warranted by principle, practice, and authority." *Id.* As a practical matter, the court explained that "where a man has been sentenced to imprisonment for one offence, and is afterwards convicted of another, what can be so proper as to make his imprisonment for the second offence, commence after the expiration of the first imprisonment." *Id.* As a matter of principle, the court expressed its view in strong terms—"Would it not be absurd, to make one imprisonment, a punishment for two offences? Nay the absurdity does not end there, for unless imprisonment for the last offence is to begin where the imprisonment for the first ends, it would be impossible, under our system, to punish the offender, in certain cases, for the last offence, at all." *Id.*

The Supreme Judicial Court of Massachusetts recognized trial courts' consecutive-sentencing authority in 1846 in *Kite v. Commonwealth*, 52 Mass.

581, 11 Met. 581 (1846). The court held that "it is no error in a judgment, in a criminal case, to make one term of imprisonment commence when another terminates." *Id.* at 585. "It is as certain as the nature of the case will admit; and there is no other mode in which a party may be sentenced on several convictions." *Id.*

In the second half of the 19th century, a large number of other state and federal courts also recognized a sentencing judge's authority to impose consecutive sentences for multiple convictions, and implicitly held that the jury plays no role in a sentencing decision of that nature. For example, the California Supreme Court described the "general rule" that a judgment be certain and definite and complete in itself, but also noted what "seems to have been a common practice in criminal Courts to enter judgments of imprisonment to commence at the expiration of sentences in other cases." *People v. Forbes*, 22 Cal. 136, 137 (1863). The court upheld this practice, as did a number of other state appellate courts in the ensuing decades. *See Williams v. State of Ohio*, 18 Ohio St. 46, 48 (1868) ("To hold that where there are two convictions and judgments of imprisonment at the same term, both must commence immediately, and be executed concurrently, would clearly be to nullify one of them."); *In re McCormick*, 24 Wis. 492, 493 (1869) ("It has long been well settled, in cases of this kind, where the prisoner has been convicted of several distinct offenses, that the court may give judgment upon each one of them, and, in doing so, may lawfully direct that the term of imprisonment for one shall

commence at the expiration of that for another, and so on, until all the terms have expired."); *State v. Carlyle*, 33 Kan. 716, 7 P. 623, 624 (1885) ("The court had the right, and it was its duty, to sentence the defendant separately under each count; and it had the right to impose the maximum punishment under each count."); *In re Packer*, 18 Colo. 525, 531, 33 P. 578 (1893) (same recognition of judicial authority, and noting that a contrary holding "would have the effect of nullifying all but one of [the sentences], a conclusion to which we cannot give our assent."); *In re Walsh*, 37 Neb. 454, 55 N.W. 1075 (1893) (stating that "the great weight of authority is in favor of the proposition that upon conviction of several offenses charged in separate indictments, or in separate counts of the same indictment, the court has power to impose cumulative sentences"); *In re Breton*, 93 Me. 39, 44 A. 125 (1899) ("the great weight of authority is undoubtedly" that trial judges have power to impose consecutive sentences without statutory authorization); *Rigor v. State*, 101 Md. 465, 470, 61 A. 631 (1905) (explaining that "[j]urisdiction to inflict cumulative punishment is dependent not on the accident that the offender has been convicted twice, or oftener, before the same tribunal, but upon the fact that distinct violations of the law have been committed by one individual whose malefactions merit separate, and, therefore cumulative, penalties."); *New Jersey v. Mahaney*, 73 N.J.L. 53, 56, 62 A. 265 (1905) (noting that "[t]he practice of imposing consecutive sentence has, so far as I am aware, been followed in this state during the entire period of its existence as a state.").

A recurring theme in those decisions was that a concurrent sentence would effectively nullify the jury's conviction. The Sixth Circuit Court of Appeals, in addressing the authority for consecutive sentences under Tennessee law, was particularly emphatic on that point. *Howard v. United States*, 75 F. 986, 990-91 (6th Cir. 1896).

> It is also a recognized method of procedure to consolidate separate indictments and try them at the same time as one case; and it is not an uncommon thing that the same defendant is convicted of more than one offense at the same term, upon separate indictments and trials. *And a rule which denies the court the power to impose cumulative sentences turns the trial and conviction on all the indictments except one into an idle ceremony.* It is hardly necessary to say that a rule which leads to such results as this is unsound in principle, and can be supported by no consistent process of reasoning. Under such a doctrine, a defendant convicted of two or a dozen crimes would suffer no greater punishment than a person convicted of one offense, except such difference as the statutory maximum and minimum limits on the sentence might justify. Such a rule finds no justification in law or morals.

Id. at 993 (emphasis added).

While the majority view was that the trial judges had inherent authority to make these aggregate sentencing determinations, a minority of states concluded that statutory authorization was necessary. But even in those states, the issue was not whether the jury had a role to play in the decision. Rather, the courts merely concluded that legislative action was required for the trial judge to exercise what was generally viewed as judicial authority. *See Miller v. Allen*, 11 Ind. 389 (1858); *James v. Ward*, 59 Ky. 271, 2 Met. 271 (1859); *Harris Bloom's Petition*, 53 Mich. 597, 19 N.W. 200 (1884); *In re Lamphere*, 61 Mich. 105, 27 N.W. 882 (1886).

People ex rel. Tweed v. Liscomb, 60 N.Y. 559 (1875), held that trial judges lacked the authority to impose consecutive sentences, but it was frequently described by courts and commentators as an outlier. *Tweed* appears largely concerned with the problem of joinder of offenses, and it certainly contains no suggestion that imposition of multiple sentences was a matter for the jury to determine. Judge Rapallo's opinion was motivated by concern that the jury might convict a defendant because of multiple claims against him if multiple offenses were joined in one proceeding. *Id.* at 595. Judge Rapallo noted that "separate and cumulative punishments can only be secured by separate indictments and trials for each offence," *id.* at 604, thus making it clear that the court's disagreement with the overwhelming weight of authority was simply with whether cumulative sentences could arise from a single prosecution. To the extent that other courts read *Tweed* to stand for

the broader proposition that trial judges lacked the authority to impose consecutive sentences, it was widely criticized and was not followed. Indeed, in his treatise on criminal procedure, Bishop described the holding in *Tweed* as "a doctrine elsewhere never heard of before, and generally rejected since," and he devoted two lengthy footnotes to attacking it. 1 J. Bishop, CRIMINAL PROCEDURE § 1327, 781, 781 n. 6 (3rd ed. 1880).

Significantly, Bishop discussed consecutive sentencing solely in terms of judicial authority. In his criminal law treatise, Bishop expressed no doubt as to a trial court's authority to impose consecutive sentences, stating: "[W]hen a prisoner, under an expired sentence of imprisonment, is convicted of a second offence; or when there are two or more convictions, on which sentence remains to be pronounced, the judgment may direct, that each succeeding period of imprisonment shall commence on the termination of the period next preceding." 1 J. Bishop, COMMENTARIES ON CRIMINAL LAW § 636, pp. 649-50 (2nd ed. 1858) (footnote omitted).

Bishop provided a more extensive discussion of consecutive sentencing in his criminal procedure treatise. There, he explained that "at common law, if an imprisonment is to commence on the expiration of another one, the sentence must so state, else the two punishments will be executed simultaneously." 1 J. Bishop, CRIMINAL PROCEDURE at 773. But that was merely a presumption—founded on the principle that a sentence must be sufficiently certain—that applied when the trial judge had failed to make clear whether

the sentences were to be served concurrently or consecutively. 1 J. Bishop, NEW CRIMINAL PROCEDURE § 1327(2), 813 (4th ed., 1895) (sentence "must in some way be of a certainty enabling the officers of the law to know when they may execute it"). Bishop explained that trial courts that have consecutive sentencing authority should give it that form:

> Yet by the common law of England, followed in most of our States, the sentence, at least in misdemeanors, may direct the imprisonment on one count or indictment to commence on the termination of that on another; and *a court having the authority should give it this form.*

Id. (emphasis added and footnotes omitted). And Bishop appears to have viewed the fact that offenses arose out of the same transaction *as a matter of mitigation* that could be argued to the trial court's discretion. He stated that "where the court has a discretion as to the punishment, it will consider in mitigation such a fact as that the several offenses occurred in what was actually or substantially one transaction." *Id.* at 815 (footnote omitted).

Thus, the American jurisprudence through the 19th century suggests no basis for concluding that the jury played a role in the decision to impose consecutive sentences for multiple convictions. *See State ex rel Meininger v. Brueuer*, 304 Mo. 381, 403, 264 S.W. 1 (1924) (explaining that it "is clear that in 1869 the law was well settled, with no well considered or reasoned case to the contrary, that American and English courts were authorized to impose cumulative sen-

tences and that no statutory authority therefor was required"). Although case law largely focused on defendants' arguments that the second sentences imposed were void because of the uncertainty as to when they would start, appellate courts accepted without question the authority of trial judges to make the consecutive-sentencing determination.

4. The necessary historical foundation for extending the *Apprendi* rule to factfinding necessary for consecutive sentences is lacking.

The historical record discussed above stands in sharp contrast to the historical record that prompted this Court to announce the rule in *Apprendi*. The history underlying the *Apprendi* rule firmly established that juries traditionally determined whether the government had proven each element of a specific offense, and it led this Court to curtail attempts to shift that determination away from the jury. By contrast, history demonstrates that the imposition of consecutive sentences always has been based on consideration of facts by the trial judge, and that the jury has never played a role.

Admittedly, that history—and the early history in particular—is limited by the nature of the sentencing decisions and the punishments that were imposed, which sometimes made cumulative punishments irrelevant. But the question of multiple punishments was not completely foreign to the framers and, to the extent it existed in 1787, it was a decision left to the trial judge. If there is any doubt about the history because of the limited nature of these multiple-

conviction determinations, it nevertheless cuts against the Oregon Supreme Court's holding because the Sixth Amendment encompasses only those historic jury functions that were a critical aspect of the jury role.

This Court has rejected the notion that the framers incorporated every common-law feature of the jury into the Sixth Amendment. *Williams*, 399 U.S. at 99. "[T]here is absolutely no indication in 'the intent of the Framers' of an explicit decision to equate the constitutional and common-law characteristics of the jury." *Id.* The Court has focused instead on "the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100. In *Williams*, the Court rejected the argument that the Sixth Amendment protected a right to a twelve-person jury, even though the history established that it was a common practice very familiar to the framers of the constitution. "To read the Sixth Amendment as forever codifying a feature so incidental to the real purpose of the Amendment is to ascribe a blind formalism to the Framers which would require considerably more evidence than we have been able to discover in the history and language of the Constitution or in the reasoning of our past decisions." *Id.* at 102-03. Surely if the Sixth Amendment does not encompass all jury practices common in 1787, the lack of any evidence of a jury role in imposing multiple sentences for multiple convictions is sufficient reason to reject the Oregon Supreme Court's rule in this case.

C. An offense-specific construction of the constitutional jury-trial guarantee in this case is consistent with this Court's holding that the determination of whether the Sixth Amendment protection attaches is offense specific.

The Oregon Supreme Court's holding also is inconsistent with this Court's Sixth Amendment jurisprudence in a different context. This Court has rejected an aggregate consideration of the multiple offenses with which a defendant has been charged in determining when the jury-trial right attaches at the outset of a prosecution. In *Lewis v. United States*, 518 U.S. 322 (1996), this Court addressed the distinction for Sixth Amendment purposes between "serious" offenses—to which the Sixth Amendment right to a jury trial attaches—and "petty" offenses—to which it does not. A maximum prison term greater than six months indicates that the legislature considered the offense serious and, therefore, the Sixth Amendment jury-trial right attaches. *Id.* at 326. To determine whether the jury-trial right attaches when a defendant is charged with multiple offenses requires consideration of the maximum penalty for each of the individual offenses, rather than the aggregate maximum penalty faced by a particular defendant. *Id.* at 323-30. This Court held that the "Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, *and its scope does not change where a defendant faces a potential aggregate prison term* in excess of six months for petty offenses charged." *Id.* at 323-24 (emphasis added).

Lewis suggests that the scope of *Apprendi*'s jury-trial right on sentence-enhancement facts also is offense specific and that the authorized aggregate penalties are immaterial. The analysis in both instances is similar as each turns on the maximum authorized sentence. *Lewis* demonstrates that the aggregate penalties in a given case do not transform the individual offenses into aggravated offenses or otherwise implicate the right to a jury trial that is addressed in *Apprendi*. *See Lewis*, 518 U.S. at 327 ("The fact that petitioner was charged with two counts of a petty offense * * * [does not] transform the petty offense into a serious one."). If the aggregate maximum punishment is immaterial for determining whether the Sixth Amendment right to a jury trial attaches at the front of a case, it should also be immaterial at sentencing.

D. The *Apprendi* rule does not encompass fact-finding necessary for consecutive sentences.

The Oregon Supreme Court extended the *Apprendi* rule to a factual determination that simply is not encompassed within that rule. The factual findings required by Oregon law to justify consecutive sentences restrict judicial discretion, but they do not remove from the jury any factual determination that the jury traditionally has been responsible for making. The history described above firmly establishes that point. It does not matter for this case that the judicial authority to impose consecutive sentences was inherent in some states and statutorily authorized in other states. Nor does it matter that Oregon has constrained that judicial authority by requiring

factfinding. What matters is that the authority to impose consecutive sentences has always been *judicial* and has never been within the province of the *jury*. If the Oregon statute encroaches on any authority by requiring factfinding, it is a limitation on judicial power and not on jury power. That is the critical distinction between the factfinding at issue here and the factfinding at issue in *Apprendi* and *Blakely*.

To make that same point in a somewhat different way, the key markers of a fact that falls within the constitutional reservation of jury power are whether the factfinding creates an aggravated offense or authorizes an enhanced sentence for an offense. The factfinding for consecutive sentences does neither.

The factfinding necessary for consecutive sentencing cannot fairly be characterized as an element of either offense. Consecutive-sentencing facts involve the relationship *between* the two offenses, for which a jury has convicted the defendant. As the Oregon Supreme Court stressed in rejecting respondent's state constitutional jury-trial claim, consecutive-sentencing "findings involve an assessment of the relationship between two crimes of which defendant is guilty—whether to determine that each crime is a separate incident, was not incidental to the other crime, or caused a different loss than did the other crime." *Ice*, 343 Or. at 261. "Because all three findings involve a comparison between *two* crimes for which [respondent] is to be punished, none of the three can reasonably be deemed to constitute an *element* of either crime." *Id.* (emphasis in original). That common-sense

assessment should apply equally as this Court considers respondent's Sixth Amendment challenge.

Nor does the consecutive-sentence factfinding authorize an enhanced punishment—either an increased loss of liberty or an increased stigma. *See Apprendi*, 530 U.S. at 484, 495 (noting both "the loss of liberty and the stigma attaching to the offense" as concerns underlying the constitutional jury-trial guarantees). To be sure, a trial court's decision whether to impose consecutive sentences has a substantial, practical impact on the total amount of time that a defendant will be required to serve for his crimes. But—for purposes of the constitutional rights at issue—the die is cast when the jury convicts the defendant of multiple offenses. In *Meachum*, 427 U.S. at 224, this Court explained that the "Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause" but that "given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." The jury verdicts authorize the imposition of the maximum statutorily authorized punishment for each of the offenses.

Put differently, the consecutive-sentencing determination transcends each offense and only becomes relevant when a jury already has convicted a defendant beyond a reasonable doubt of two or more offenses. Consecutive sentences increase a defendant's

aggregate punishment, but they do not increase the statutory maximum for any of the underlying individual offenses. A defendant's consecutive sentences merely reflect that the jury convicted him of committing multiple crimes. In this case, the jury convicted respondent of six separate crimes. Each conviction authorized a separate maximum sentence and the trial judge imposed a separate sentence on each conviction that fell within that authorized maximum sentence.[1] The timing of how those separate sentences are to be served do not increase the punishment on any of the six convictions. Nor does it increase the stigma associated with any of the six convictions. The imposition of consecutive sentences does not influence the evaluation of respondent's criminal history should he face a criminal prosecution in the future. *See* Or. Admin. R. 213-004-0006(2) (the sentencing guidelines promulgated by the Oregon Criminal Justice Commission establish that an "offender's criminal history is based upon the *number* of adult felony and Class A misdemeanor convictions and juvenile adjudications in the offender's criminal history at the time the current crime or crimes of conviction are sentenced") (emphasis added). Nor does the imposition of consecutive sentences brand respondent in

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[1] The trial judge imposed departure sentences on four of the six convictions. J.A. 39-41. Clearly, the factual findings necessary for each departure sentence fall within the *Apprendi* rule. But, as a matter of state law, respondent did not preserve any challenge to those departure sentences. *Ice*, 343 Or. at 253-54. Thus, this Court must treat the departure sentences as authorized by the jury verdict.

the public view as having committed a more serious offense.

Consequently, the Oregon Supreme Court was too quick to deem it "self-evident * * * that a defendant is exposed to greater punishment [for *Apprendi* purposes] if he is required to serve multiple sentences consecutively, rather than concurrently." *Ice*, 343 Or. at 266 n. 5. To the contrary, as this Court stated in 1901, "[c]umulative sentences are not cumulative punishments[.]" *Carter v. McClaughry*, 183 U.S. 365, 394 (1901). Separate convictions carry separate penalties. And this Court repeatedly has noted that jury sentencing is not constitutionally required. In *Profitt v. Florida*, 428 U.S. 242, 252 (1976), the plurality noted that the Court had "never suggested that jury sentencing is constitutionally required." The Court later stated the principle more broadly in concluding that "a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding—a determination of the punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citation omitted). Nothing in the *Apprendi* line of cases changes the basic principle that the Sixth Amendment jury-trial guarantee does not protect a right to jury sentencing. Rather, this Court has confirmed that "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93 (citing *Spaziano*, 468 U.S. at 459). That principle applies as well to the consecu-

tive sentences imposed in this case, and to the findings that supported those sentences.

The Oregon Supreme Court thus failed to appreciate that this Court's concern in *Apprendi* was on restoring the Sixth Amendment's protections of the jury's traditional role. The state court instead declared an indefensibly broad rule: that whenever the legislature requires factfinding that has any effect on the aggregate punishment of the defendant, that fact must be found by the jury. But that holding confuses the question. The question in the *Apprendi* line of cases was whether the required fact was within the scope of the historic jury right and, if so, whether the legislature constitutionally could remove that factual determination from the jury's purview. If the factual determination at issue was never a determination that juries historically were responsible for making, it cannot matter that the legislature has authorized the judge to engage in factfinding. That requirement does not encroach on the jury's traditional power and does not usurp the jury's prerogative. That requirement reflects nothing more than legislative restraint on the court's exercise of its traditional discretionary authority. And, as this Court has previously stated, the Sixth Amendment is "not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Blakely*, 542 U.S. at 308. Because the Oregon consecutive-sentencing statute is a limitation on judicial power and because it does not infringe upon the jury's historic role, it does not violate the Sixth Amendment.

CONCLUSION

This Court should confirm that the Sixth Amendment jury-trial guarantee protects only the historic role that the jury plays in determining whether the government has proved each factual element of a specific offense. Because the facts required by Oregon law for consecutive sentences are not elements of either offense and were never within the jury's purview, they do not fall within the constitutional jury-trial guarantee. This Court should reverse the Oregon Supreme Court's judgment and remand the case for further proceedings.

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RESPONDENT'S BRIEF

101 FOR ARGUMENT

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STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of Oregon

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

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SUMMARY OF ARGUMENT

Under Oregon law, a sentencing judge cannot impose a consecutive sentence based solely on a jury's guilty verdict. State law requires a judge to find additional facts about a defendant's offense in order to impose a consecutive sentence. The requirement reflects a legislative policy choice. Specifically, the legislature decided that the appropriate sentence for an offense that is merely incidental to another offense and does not risk or cause greater harm than the other offense is a concurrent sentence. The legislature has distinguished between incidental and non-incidental offenses and authorized different maximum punishments for each. In the absence of the legislatively-identified facts, Oregon law entitles the defendant to a concurrent sentence for each and any offense.

Apprendi instructs that under the Sixth Amendment, a criminal defendant has the right to have a jury find any fact (other than a prior conviction) that increases the maximum punishment for an offense. That bright-line rule ensures that the Sixth Amendment right to trial by jury preserves the core protection intended by the Framers: The judge may impose no greater punishment than the law permits for the facts established by the jury verdict. Consequently, when a legislature conditions an increase in the maximum punishment for a criminal offense upon any factual circumstance, a defendant has the right to have that circumstance passed on by a jury of his peers.

The State contends that the *Apprendi* rule merely "prohibit[s] a legislature, with respect to a specific offense, from shifting the determination of an element from the jury to the sentencing judge." Pet. Br. at 21. According to the State, findings necessary to impose a consecutive sentence simply do not implicate the Sixth Amendment's jury-trial guarantee, because juries *historically* have found only guilt-establishing "elements" and have never played a role in imposing consecutive sentences. Pet. Br. at 54-55.

The State's argument rests on two propositions. First, the Sixth Amendment guarantees a jury finding only as to "constitutional elements" or "constitutionally protected elements" – the State's proposed terms for "factual determinations that a jury must make in deciding a defendant's guilt for a specific offense." Pet. Br. at 11, 20-21. Second, a consecutive sentence is no greater punishment for an offense than a concurrent sentence. Pet. Br. at 55-59.

The State's first proposition is untenable, as this Court has repeatedly rejected labels and a formalistic taxonomy of offense "elements" to construe the scope of the Sixth Amendment's jury-trial guarantee. The term "element" is neither a constitutional term nor the touchstone of the jury trial right. Or to put it differently, for Sixth Amendment purposes, an "element" is nothing more than a label for those facts necessary to impose or increase punishment.

In the Framers' era, the guilt-establishing facts set the maximum sentence because offenses were

sanction specific. In response to novel and evolving legislative criminal law schemes, this Court identified the core procedural guarantee the Framers enshrined in the Sixth Amendment. That guarantee, in plainest terms, is that the jury verdict defines the upper bounds of the judge's authority to punish.

When contemporary legislatures identify *additional* facts necessary to increase punishment, those facts trigger the jury trial right. Irrespective of legislative permutations to substantive and procedural criminal law, the critical inquiry remains *functional*: Did the judge rely on independent factfinding to impose a punishment that exceeded what the law authorized based solely on the facts found by the jury? The State's "constitutional element" rule is incompatible with that functional test.

The State's second claim, that consecutive sentencing does not increase the punishment for an offense, misapprehends the nature of a consecutive sentence. A sentence of incarceration is punishment for an offense, regardless of whether the defendant serves that sentence concurrently with, or consecutively to, other sentences. The imposition of a consecutive sentence increases the punishment for that offense, because consecutiveness delays the commencement and expiration of the sentence. Consequently, the impairment of a defendant's personal liberty attendant to a consecutive sentence differs significantly from that attendant to a concurrent sentence.

A legislature is free to identify the facts necessary for a conviction, and it is also free to identify other facts that set the maximum punishment, but it may not circumvent the jury – whose constitutional role is to check the government's power to both convict and punish – by authorizing a judge to find any of those facts.

ARGUMENT

The Sixth Amendment rule from *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), is direct and concise:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Despite its simple elegance, this Court has had to reiterate the rule and reverse lower courts four times since *Apprendi*. *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

Under Oregon law, a guilty verdict, by itself, does not authorize the imposition of a consecutive sentence. When an Oregon jury finds a defendant guilty of multiple offenses, the judge may impose a consecutive sentence for an offense only after finding additional facts about the offense. *State v. Ice*, 343 Or. 248, 265 & n.4, 170 P.3d 1049 (2007) (citing OR. REV. STAT. § 137.123).

In Respondent's case, the judge (not the jury) found the facts that authorized the imposition of three consecutive sentences for three offenses. Thus, the issue presented in this case is whether the Sixth Amendment guarantees a criminal defendant the right to a jury determination on the predicate facts that authorize the imposition of a consecutive sentence under Oregon law. On review in this Court, the

State of Oregon contends that the Sixth Amendment right to trial by jury reaches "only to those facts historically found by the jury as part of the guilt determination – in other words, [the jury-trial guarantee] applies only to the elements of an offense," which the State terms "the constitutional elements of an offense." Pet. Br. at 14, 20, 21.

In the following argument, Respondent notes the origins of the *Apprendi* rule, explains that the rule applies to any fact – regardless of its label – that authorizes increased punishment, demonstrates how *Ring*, *Blakely*, *Booker*, and *Cunningham* specifically reject the argument the State presents here, and explains how imposition of a consecutive sentence under Oregon law increases the punishment for a single offense in violation of the *Apprendi* rule.

A. The *Apprendi* rule originated from the due process requirement that the prosecution prove beyond a reasonable doubt the facts essential to a criminal defendant's culpability and authorized punishment.

As noted in *Apprendi*, the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment's jury-trial guarantee

> *indisputably* entitle a criminal defendant to "a jury determination that [he] is guilty of every *element* of the crime with which he is charged, beyond a reasonable doubt."

Apprendi, 530 U.S. at 477 (emphases added) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). Several decades have passed since this Court first confronted the question whether a criminal defendant's Fourteenth Amendment due process right to proof beyond a reasonable doubt "of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. 358, 364 (1970), is limited to "elements."

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Court deferred to Maine's interpretation of the "elements" of its homicide statutes but instructed that the establishment of *other* facts bearing on the extent of criminal culpability and punishment must also comport with due process. There, the Maine homicide statutes presumed all intentional killings were committed with malice aforethought and punishable as murder by life imprisonment. *Id.* at 685-87 & nn.3-4. The statutes placed on the defendant the burden to rebut the presumption of malice with proof that he acted in the heat of passion upon sudden provocation, in which case the homicide was reduced to manslaughter and punishable by a maximum 20-year sentence of incarceration. *Id.* Maine's highest court ruled that murder and manslaughter were merely "different degrees of the single generic offense of felonious homicide." *Id.* at 688. As such, neither malice aforethought nor heat of passion were "elements" of homicide; rather, they bore only on the appropriate "punishment category" for that crime. *Id.* at 689 & n.9. In this Court, Maine argued that

presuming malice aforethought and allocating to defendant the burden of disproving that fact did not implicate due process because malice aforethought was not a "general element[ ] of the crime of felonious homicide." *Id.* at 699.

The Court characterized and rejected Maine's argument as a reduction of the *Winship* rule to mere formalism:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. . . .
>
> *Winship* is concerned with substance rather than this kind of formalism.

Id. at 698-99. To determine whether Maine's scheme ran afoul of the Fourteenth Amendment, the Court focused on the potential consequences attendant to the existence of "malice aforethought":

> [T]he criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract *but also with the degree of criminal culpability*. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]," they are

> subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*.

Id. at 697-98 (emphasis added) (citation omitted).

Notably, the Court did not (as the State suggests) resort to relabeling malice aforethought a "constitutional element." Pet. Br. at 14. The Court distinguished between *elements* of an offense, which are determined by state law, and *facts* that the Constitution requires the prosecution to prove beyond a reasonable doubt to obtain a conviction and impose punishment. *Mullaney*, 421 U.S. at 691 ("This Court . . . repeatedly has held that state courts are the ultimate expositors of state law, and that we are bound by their constructions except in extreme circumstances not present here." (citations omitted)). The Court did not rewrite Maine law to redefine the elements of murder, because defining the elements of a statutory crime is a legislative, and not a judicial, function. Rather, the Court identified a fact that lacked a legislative label but nonetheless had constitutional significance because it reflected greater culpability and resulted in greater punishment.

In subsequent cases, this Court continued to analyze the functional effect of a fact to assess its constitutional significance, rather than rely on its denomination as an "element."

In *Patterson v. New York*, 432 U.S. 197 (1977), the Court considered a New York statute that defined murder as intentional killing. New York law allocated to the defendant the burden to prove *the mitigating fact* that he was under extreme emotional distress, which reduced the homicide to manslaughter. *Id.* at 198-99. New York's statute satisfied due process because the prosecution had the burden to prove *all* the facts that constituted the crime, unlike the statute in *Mullaney*, which presumed that the existence of one fact (intent to kill) established the existence of a different fact (malice aforethought). *Id.* at 205-06.

After *Patterson* and several years before *Apprendi*, the Court cautioned that a legislature's power to identify facts that increase the punishment for an offense had "constitutional limits" that, if exceeded, would make "facts not formally identified as elements of the offense charged" subject to the Due Process Clause and the Sixth Amendment's jury-trial guarantee. *McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986). There, the Court considered the due process implications of a Pennsylvania statute that provided for a mandatory minimum sentence if the judge found by a preponderance that the offender visibly possessed a firearm during the commission of certain felonies. *Id.* at 80-81. The Court employed a multifactor test for determining whether a defendant's visible possession of a firearm was a fact that due process required the prosecution to prove beyond a reasonable doubt. The Court considered whether Pennsylvania's scheme presumed the existence of any

fact, relieved the prosecution of its burden of proving guilt, created a separate offense calling for a separate penalty rather than merely limiting the sentencing court's discretion in selecting a sentence within the authorized range, or "tailored" the firearm fact "to be a tail which wags the dog of the substantive offense." *Id.* at 87-88. In reaching its conclusion that Pennsylvania's legislative scheme did not offend due process, the Court emphasized that the firearm fact did not increase the maximum sentence authorized by the jury verdict but merely guided the sentencing judge's imposition of a minimum sentence within the statutory maximum. *Id.* at 87-89.

After determining that the prosecution did not have to prove the firearm fact beyond a reasonable doubt, the Court summarily rebuffed the petitioners' challenge under the Sixth Amendment's jury-trial guarantee. *Id.* at 93. The Court left unanswered whether the jury trial right applies to facts that increase the maximum punishment for a crime.

Mullaney and *Patterson* are Fourteenth Amendment cases that concern the permissible allocation of the burden of proof for facts that establish a defendant's criminal culpability and maximum punishment, regardless of whether the legislature identified those facts as elements when defining the offense. *McMillan* goes further and presages the *Apprendi* line of cases in its observation that legislatures cannot avoid Sixth Amendment requirements by excluding constitutionally-significant sentencing facts from the definition of the offense.

B. *Jones* suggested – and *Apprendi* confirmed – that the Sixth Amendment's jury-trial guarantee applies not only to guilt-establishing elements but to any fact (other than prior convictions) that increases the maximum punishment for an offense.

The concerns that the Court voiced in *McMillan* resurfaced in *Jones v. United States*, 526 U.S. 227 (1999), and were realized in *Apprendi*. At issue in *Jones* was whether facts identified in the federal carjacking statute, which increased the maximum punishment if the offense resulted in serious bodily injury or death, were "elements" that the jury had to find beyond a reasonable doubt or "sentencing factors" that a judge could find by a preponderance of the evidence. *Jones*, 526 U.S. at 229-32. The Court held that the facts were "elements" to avoid unnecessarily deciding an open constitutional question:

> [W]hen a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?

Id. at 242. Foreshadowing *Apprendi*, the Court emphasized that the resolution of that constitutional question would not depend on whether a fact was identified as an "element":

> The constitutional guarantees that give rise to our concern in no way restrict the ability of legislatures to identify the conduct they wish to characterize as criminal or to define

> the facts whose proof is essential to the establishment of criminal liability. The constitutional safeguards that figure in our analysis *concern not the identity of the elements defining criminal liability but only the required procedures for finding the facts that determine the maximum permissible punishment*; these are the safeguards going to the formality of notice, the identity of the factfinder, and the burden of proof.

Id. at 243 n.6 (emphasis added).

During the following Term, *Apprendi* presented the constitutional issue anticipated in *Jones*. *Apprendi* involved New Jersey's anti-hate-crime law, which authorized an increase to the maximum penalty for a firearm offense if the judge found that the defendant committed the offense with the purpose of intimidating others because of their race. 530 U.S. at 491. New Jersey argued that the Sixth Amendment's jury-trial guarantee did not apply because "[t]he required finding of biased purpose [was] not an 'element' of a distinct hate crime offense, but rather the traditional 'sentencing factor' of motive." *Id.* at 492. The Court rejected New Jersey's argument, wholly endorsing the principle identified in *Jones*: The Sixth Amendment's jury-trial guarantee is not wedded to "elements" of a particular offense but applies to *any* fact (other than a prior conviction) that exposes the defendant to an increase in the maximum punishment for the offense. *Apprendi*, 530 U.S. at 476, 490 (citing *Jones*, 526 U.S. at 243 n.6

(majority opinion of Souter, J.), 252-53 (Stevens, J., concurring), 253 (Scalia, J., concurring)).[1]

To reach that conclusion, the Court examined the history of the jury trial right to identify the protections guaranteed by the Sixth Amendment. In the Framers' era, the jury-trial guarantee required the prosecution to prove to the jury the "elements" of statutory or common law crimes, which both established guilt and defined the maximum punishment. *Apprendi*, 530 U.S. at 477-83; *see also id.* at 479 ("The

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[1] Justice Thomas observed that the term "element" had no other meaning in the Framers' era; it referred to each factual accusation that combined with other accusations to comprise a core crime, plus any additional factual accusations that increase punishment:

> A long line of essentially uniform authority addressing accusations, and stretching from the earliest reported cases after the founding until well into the 20th century, establishes that the original understanding of which facts are elements was even broader than the rule that the Court adopts today.
>
> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is a form of petit larceny. The aggravating fact is an element of the aggravated crime.

Apprendi, 530 U.S. at 501 (Thomas, J., concurring).

substantive criminal law [of late eighteenth century England] tended to be sanction-specific; it prescribed a particular sentence for each offense.").[2]

The Framers intended the Sixth Amendment's jury-trial guarantee to operate as a particular procedural "bulwark" between the accused and both the prosecuting official and the judicial sanctioner. *Id.* at 477. As Blackstone noted, trial by jury "hold[s] much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the

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[2] Because the substantive criminal law tended to be sanction specific, juries had – and exerted – power over a defendant's sentencing. As the Court recognized in *Jones*, juries would convict defendants of lesser offenses in order to limit the sentence that a judge could impose:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

526 U.S. at 245 (citing 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 238-39 (1769)). "Pious perjury" was used most commonly to defeat attempts to impose the death penalty. John H. Langbein, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 57-58 (2003) (citing 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND at 239). And, its use was not infrequent. Indeed, juries exercised this power in nearly twenty-five percent of "a sample of London cases from the Old Bailey in the 1750's." *Id.* at 58-59.

violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another[.]" 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769), *quoted in Apprendi*, 530 U.S. at 479 n.6. That "bulwark" ensures that the judge's authority to punish derives solely from the jury's verdict. *Id.* at 482-83; *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1973 (2005) (noting that criminal law required the death penalty for numerous offenses and, for those offenses, "there was no distinction between the trial rights and sentencing rights . . . in both purpose and effect, the trial was the sentencing"). The Court concluded that it had adhered faithfully to that intent, with the sole exception being the fact of a prior conviction. *Apprendi*, 530 U.S. at 484-90.

When a legislature conditions an increase in punishment on facts other than those establishing guilt, limiting the jury-trial guarantee solely to guilt-establishing facts denies a defendant the basic protection the Framers intended:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he

> would receive if punished according to the facts reflected in the jury verdict alone.
>
> . . . If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached.

Id. at 482-84 (footnote omitted).

The Court reasoned that affording those protections in the face of novel sentencing schemes requires a *functional* inquiry free from the labels and formalism New Jersey invoked by arguing that the fact was the "non-elemental" sentencing factor of "motive":

> Despite what appears to us the clear "elemental" nature of the factor here, the relevant inquiry is one not of form but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Id. at 494.

C. Post-*Apprendi* cases reaffirm that the right to a jury trial applies to all *facts* that establish criminal liability or increase punishment for an offense, regardless of whether the fact is labeled an element, a sentencing enhancement, an aggravating circumstance, an offender-related fact, or anything else.

The State argues that the Sixth Amendment right to a jury trial is offense specific and applies "only to those facts historically found by the jury as part of the guilt determination." Pet. Br. at 21. According to the State, the *Apprendi* rule applies only to "the elements necessary for a specific conviction." Pet. Br. at 22. Those types of facts are "constitutional elements of a discrete offense that cannot be removed from the jury's consideration" and "shifted" to a judge. Pet. Br. at 14, 16. The State argues that guilt-establishing facts implicate the jury-trial right, while historical sentencing facts do not and thus can be found by a judge: "Again, the applicable constitutional rule is offense specific and focuses on identifying the correct demarcation between factual findings that are constitutional elements of an offense that a jury must find and facts that can be shifted away from the traditional jury determination." Pet. Br. at 16.

The State's quest for "constitutional elements" that must be found by a jury and may not be "shifted" to a judge fundamentally misperceives the thrust of *Apprendi*. Far from searching for some Platonic set of elements that can only be found by a jury, *Apprendi*

and subsequent cases explain that the Sixth Amendment is concerned with a functional assessment of the relationship between factfinding and punishment. Facts that expose an individual to a criminal conviction or increase the maximum punishment for an offense have Sixth Amendment significance. Legislative labels such as element, sentencing enhancement, aggravating circumstance, and offender-related fact have no currency in the constitutional analysis. The critical inquiry is whether the existence of the fact underlying the label exposes a criminal defendant to a conviction or increases the maximum punishment for an offense: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring*, 536 U.S. at 602 (citing *Apprendi*, 530 U.S. at 482-83).

The Court has long recognized that "there are obviously constitutional limits beyond which the States may not go" in legislating substantive criminal offenses and sentencing schemes. *Patterson*, 432 U.S. at 210; *McMillan*, 477 U.S. at 85, 91 (suggesting that the "constitutionality of statutes" may depend on "differences of degree" but not articulating a "bright-line test").

Apprendi and subsequent cases articulate the bright-line test for determining whether a state has exceeded constitutional limits. The rule is simple, functional, and faithful to the jury's historic role in the criminal justice system: Did the judge impose a

sentence in excess of the sentence authorized solely by the jury verdict? If the answer is yes, the Sixth Amendment was violated. *Blakely*, 542 U.S. at 303; *Ring*, 536 U.S. at 602; *Apprendi*, 530 U.S. at 483.

By contrast, the State's proposed "test" for "constitutionally protected elements" evokes the same subjective and elusive multi-factor inquiry that this Court initially suggested in *McMillan* but specifically rejected in *Blakely*. 542 U.S. at 307 ("The subjectivity of [the *McMillan*] standard is obvious."). The State's proposal is especially unhelpful in a federal system in which individual states enact substantive and procedural criminal codes that reflect local policies, interests, and concerns. *McMillan*, 477 U.S. at 90 (rejecting petitioners' argument that the sentencing fact at issue – visible possession of a firearm – was really an element of the crime because many other states had made the same fact an element of various aggravated offenses: "But the fact that the States have formulated different statutory schemes to punish armed felons is merely a reflection of our federal system[.]").

Similarly, the State's proposed division between elements establishing guilt and facts relevant to sentencing is the precise issue that split the majority and the dissent in *Booker*. As the State does here, the *Booker* dissenters argued that the Court should honor the historic distinction between facts establishing guilt for an offense (which were for the jury) and facts relevant to sentencing (which could be found by a judge). The *Booker* dissenters' criticisms of the

Apprendi rule and the State's argument in this case are fundamentally the same:

> The Court reiterates its view that "the right of trial by jury has been understood to require" a jury trial for determination of "*the truth of every accusation*." This claim makes historical sense insofar as an "*accusation*" encompasses each factual *element* of the crime of which a defendant is accused. But the key question here is whether that word also encompasses *sentencing facts* – facts about the offender (say, recidivism) or about the way in which the offender committed the crime (say, the seriousness of the injury or the amount stolen) that help a sentencing judge determine a convicted offender's specific sentence.
>
> History does not support a "right to jury trial" in respect to sentencing facts. Traditionally, the law has distinguished between facts that are elements of crimes and facts that are relevant only to sentencing. Traditionally, federal law has looked to judges, not to juries, to resolve disputes about sentencing facts. . . .
>
> The administrative rules at issue here, Federal Sentencing Guidelines, focus on *sentencing facts*. They circumscribe a federal judge's sentencing discretion in respect to such facts, but in doing so, they do not change the nature of those facts. The sentencing courts continue to use those facts, not to convict a person of a crime as a statute

> defines it, but to help determine an appropriate punishment.

Booker, 543 U.S. at 327-29 (Breyer, J., dissenting) (citations and internal quotation marks omitted).

The State's argument in this case channels the *Booker* dissent: "If the factual determination at issue was never a determination that juries historically were responsible for making, it cannot matter that the legislature has authorized the judge to engage in factfinding." Pet. Br. at 59.

But the *Apprendi* rule applies to facts historically relevant only to the judge's sentencing decision, including offender-specific facts. Indeed, in both *Blakely* and *Cunningham*, this Court held that the Sixth Amendment applied to offender-specific facts and facts traditionally considered by a judge *only after* the jury's adjudication of guilt.

The petitioner in *Blakely* pleaded guilty to kidnapping his estranged wife. 542 U.S. at 298. The maximum sentence based on the plea alone was 53 months. *Id.* at 299. Under Washington's sentencing law, if the sentencing court found the existence of an "aggravating factor," it could impose an "exceptional sentence" above the standard sentencing range. *Id.* The judge determined that Blakely had acted with "deliberate cruelty," one of the statutorily enumerated aggravating factors from a non-exhaustive list, and imposed an "exceptional" sentence of 90 months. *Id.* at 300-01. The Court rejected Washington's argument that the sentencing scheme functioned like the

mandatory minimum scheme in *McMillan* and reversed, reasoning that the "judge's authority to sentence derives wholly from the jury's verdict." *Blakely*, 542 U.S. at 306.

Curiously, the State fails to address or even cite *Ring* or *Cunningham*, two prominent cases involving the application of *Apprendi* to sentencing schemes that authorized increased punishment based on judicial findings of traditional sentencing facts.

In *Ring*, this Court considered whether Arizona's capital punishment scheme, which required a judge to find one of several enumerated "aggravating factors" in order to impose a sentence of death, violated the jury-trial guarantee. 536 U.S. at 597. Arizona argued that its legislature added the aggravating factor requirement only because this Court held that some form of narrowing mechanism was necessary to comport with Eighth Amendment demands for the non-arbitrary imposition of the death penalty. *Id.* at 605-07; *see also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman* [*v. Georgia*, 408 U.S. 238 (1972) (*per curiam*)], our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

Arizona maintained in this Court that its legislature did not create, nor intend to create, an additional "element" for capital offenses. *Ring*, 536 U.S. at 604. Rather, it merely enacted safeguards to ensure that

the sentencer justifiably exercised its discretion to impose the ultimate punishment on a particular capital defendant. *Id.* at 605-06. The Court rejected Arizona's attempt to distinguish *Apprendi*, emphasizing "the relevant inquiry is one not of form, but of effect." *Id.* at 604 (quoting *Apprendi*, 530 U.S. at 494).

As in *Apprendi*, the *Ring* Court declined to limit the scope of the Sixth Amendment to "traditional" elements and returned, instead, to the controlling principle: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* at 602 (citing *Apprendi*, 530 U.S. at 482-83).

In *Cunningham*, California's Determinate Sentencing Law (DSL) authorized a judge to impose the upper term of a three-tiered sentencing scheme after identifying any "aggravating circumstance" that, by statutory definition, *could not be* an element of the offense. 127 S. Ct. at 861-62. California Rules provided a "nonexhaustive list of aggravating circumstances, including '[f]acts relating to the crime,' '[f]acts relating to the defendant,' and '[a]ny other facts statutorily declared to be circumstances in aggravation.'" *Id.* at 862 (internal citations to rules omitted).

Using language eerily similar to the language proffered by the State in this case, the California Supreme Court had concluded that the DSL comported with the jury-trial guarantee because it

> [did] not represent a legislative effort to shift the proof of particular facts from elements of a crime (to be proved to a jury) to sentencing factors (to be decided by a judge). . . . Instead, it afforded the sentencing judge the discretion to decide, with the guidance of rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence. Such a system does not diminish the traditional power of the jury.

People v. Black, 35 Cal. 4th 1238, 113 P.3d 534, 544 (2005) (footnote omitted), *quoted in Cunningham*, 127 S. Ct. at 868-69.

Ultimately, California's proposed distinction between elements of a crime and sentencing factors proved unpersuasive to the Court:

> Asking whether a defendant's basic jury-trial right is preserved, although some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi*'s "bright-line rule" was designed to exclude.

Cunningham, 127 S. Ct. at 869.

In *Cunningham*, two Justices specifically proposed limiting the *Apprendi* rule to offense-related facts, because offender-related facts "should be taken into account at sentencing but have little if any significance for whether the defendant committed the crime." 127 S. Ct. at 873 (Kennedy, J., dissenting) (citing Berman & Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 55-57 (2006)). The majority declared simply that "*Apprendi* itself, however, leaves no room for [that] bifurcated approach." *Id.* at 869 n.14.

This Court adheres to the functional inquiry articulated in *Apprendi*; it does not defer to legislative labels, employ a formalistic view of historical "elements," or consider whether the legislature impermissibly "shifted" matters historically within the jury's purview to the judge. The core principle remains the same. The Sixth Amendment guarantees a particular fundamental procedure to criminal defendants, namely, the right to jury findings "on all facts essential to imposition of the level of punishment that the defendant receives – whether the legislature calls them elements of the offense, sentencing factors, or Mary Jane." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

By contrast, the State's proposal violates common law principles the jury trial right is intended to preserve. The *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence":

> that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors," 4 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55 (2d ed. 1872).

Blakely, 542 U.S. at 301-02.

Although the judge at common law had sentencing discretion and could allow "his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment," the judge's exercise of sentencing discretion was absolutely circumscribed by the allegations contained in the indictment and proven to a jury: "The aggravating circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner[.]" 1 J. Bishop, CRIMINAL PROCEDURE § 85, p. 54 (2d ed. 1872).

The State's proposal undermines the jury's role "in our constitutional structure." *Blakely*, 542 U.S. at 306. The jury's role is to find the facts that "the law makes essential to the punishment." *Id.* at 304 (quoting 1 J. Bishop, CRIMINAL PROCEDURE § 87, p. 55). The State's rule would allow precisely what the Sixth

Amendment forbids – an increase in a criminal defendant's maximum punishment based on facts not "proved to his peers beyond a reasonable doubt." *Id.* at 312.

D. Because the statutory maximum punishment for an offense under Oregon law is a concurrent sentence, facts necessary to impose a consecutive sentence must be found by a jury.

The State claims that the *Apprendi* rule does not apply to facts necessary to impose a consecutive sentence because determinations of those facts have never been within the jury's purview, which, in turn, defines the scope of the jury trial right. The State thereby answers the question presented, not by applying the functional rule of *Apprendi*, but by retreating to historical practice. The rule in *Apprendi*, however, was identified to *maintain* the Sixth Amendment's jury-trial guarantee when practices *change* and guilt-determining facts no longer set the maximum punishment.

Moreover, the State asserts that facts necessary to authorize a consecutive sentence do not implicate the *Apprendi* rule because those facts do not "authorize an enhanced punishment" for any single offense. Pet. Br. at 56. But history and practice establish that a consecutive sentence is an aspect of "punishment"

for a single offense and that a consecutive sentence is greater punishment than a concurrent sentence for the same offense. Because Oregon law conditions that greater punishment on facts, a jury must find those facts beyond a reasonable doubt.

1. The *Apprendi* rule precludes the State's "constitutional element" limitation.

The State maintains that it should not be required to prove to a jury facts necessary to authorize a consecutive sentence because (1) "the Sixth Amendment encompasses only those historic jury functions that were a critical aspect of the jury role[,]" and (2) the jury's only role was to "determin[e] whether the government had proven each element of a specific offense." Pet. Br. at 51-52. The State thereby attempts a complete end-run around the rule of *Apprendi* by insisting that, even if the rule was violated on its face, the rule is simply inapplicable here: "Because the facts required by Oregon law for consecutive sentences . . . were never within the jury's purview, they do not fall within the constitutional jury trial guarantee." Pet. Br. at 60. The result is the State's complete rejection of *Apprendi*'s functional test for determining whether a fact implicates a criminal defendant's Sixth Amendment right to trial by jury.

The State's fundamental misunderstanding of this Court's precedents stems from its refusal to acknowledge that the *only* acceptable definition of "element," if one must use that term, is "every fact that is by law a basis for imposing or increasing punishment (in contrast to a fact that mitigates punishment)." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring).

> [I]f the legislature, rather than creating grades of crimes, has provided for setting the punishment for a crime based on some fact – such as a fine that is proportional to the value of stolen goods – that fact is also an element. . . . *One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.*

Id. (Thomas, J., concurring) (emphasis added); *see also id.* at 483 n.10 (majority opinion of Stevens, J.) ("Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense.").

So it is of no consequence that the State argues "[t]he factfinding necessary for consecutive sentencing cannot fairly be characterized as an element of either offense" because the "facts involve the relationship *between* the two offenses[.]" Pet. Br. at 55. Even

accepting for the moment the State's characterization,[3] it does not change the consequence attendant to

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[3] Accepting the characterization, however, is far from warranted. Each of the findings required by Or. Rev. Stat. § 137.123 to impose a consecutive sentence directly describes the commission of "*the criminal offense* for which a consecutive sentence is contemplated." OR. REV. STAT. § 137.123(5)(a), (b) (emphasis added). The Oregon Legislature selected facts that reflect a defendant's culpability, including the traditionally "elemental" matters of the defendant's mental state (*i.e.*, "willingness") and the nature and gravity of the harm risked or caused. *Id.* Those findings are more plainly "offense-specific" facts than the "offender-related" facts at issue in *Cunningham*.

Moreover, the State's observation that the consecutive sentencing statute identifies facts about an offense by comparing the offense to other offenses does not mean the identified facts cease being facts about the offense. That reasoning would suggest that the fact that a basketball is bigger than a baseball is not a fact about basketballs.

In any event, this Court has already held that facts concerning the relationship between offenses are subject to the *Apprendi* rule. For example, the aggravating circumstances at issue in *Ring* exposing an Arizona criminal defendant to the death penalty included: (1) "the defendant knowingly created a grave risk of death to another person or persons in addition to the person murdered," (2) "the defendant has been convicted of one or more homicides . . . during the commission of the offense," and (3) "the defendant committed the offense while . . . on . . . unauthorized release from the state department of corrections." *Ring*, 536 U.S. at 593 n.1 (quoting ARIZ. REV. STAT. ANN. § 13-703(G)(3), (8), (7) (West Supp. 2001)).

Oregon law virtually mirrors Ariz. Rev. Stat. Ann. § 13-703(G)(3) in that a basis for imposing a consecutive sentence is that "the criminal offense for which a consecutive sentence is contemplated . . . caused or created a risk of causing loss, injury, or harm to a different victim than was caused or threatened by the other offense or offenses[.]" OR. REV. STAT. § 137.123(5)(b).

the facts – exposing the defendant to greater punishment for an offense. For example, the Oregon Legislature could have enacted a consecutive-sentencing scheme based on the anti-hate-crime policy at play in *Apprendi*. The legislature could have provided that a court lacks authority to impose a consecutive sentence for any offense unless the court found that the defendant committed the offense "with a purpose to intimidate an individual or group of individuals because of race[.]" 530 U.S. at 469 (quoting New Jersey anti-hate-crime statute). As this Court observed in *Apprendi*, the "clear 'elemental' nature" of the fact would not change the analysis. *Id.* at 494.

The controlling question is, of course, whether the judge imposed a punishment that exceeded that allowed solely by the facts found by the jury or admitted by the defendant. Respondent now turns to that issue.

2. Consecutiveness and concurrence are aspects of punishment for a single offense.

Respondent has no quarrel with the State's chronicle of consecutive sentencing practices through the ages. Pet. Br. at 29-52. When a jury found a defendant guilty of several offenses, the common law and early American jurisprudence gave the judge plenary authority to impose a consecutive sentence for an offense *based merely on the fact that the jury found him guilty of the offense*. 1 J. Bishop, COMMENTARIES ON CRIMINAL LAW § 636, pp. 649-50 (2d ed. 1858). In most jurisdictions, that tradition holds today. *See, e.g., Callanan v. United States*, 364 U.S.

587, 597 (1961) (under federal law a sentencing judge has authority to impose consecutive sentences unless Congress directs otherwise); *see also* Br. in Opp. at 3-10 & n.3 (surveying jurisdictions' statutory or common law grant of plenary authority to judges to impose a consecutive sentence for any offense).

But the Oregon Legislature deviated from tradition by enacting a statutory sentencing scheme that *requires* additional facts to authorize a consecutive sentence as an enhanced punishment for an offense. Under the statute, "with respect to offenses that arise out of the same continuous and uninterrupted course of conduct, the jury's issuance of multiple guilty verdicts will *only* support concurrent sentences, unless the judge makes those required findings." *Ice*, 343 Or. at 265.[4]

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[4] Moreover, Oregon "former jeopardy" law forbids a prosecutor from bringing successive prosecutions against a defendant for offenses arising out of the same criminal episode. Or. Const. art. 1, § 12; *State v. Brown*, 262 Or. 442, 457-58, 497 P.2d 1191 (1972); *see also* OR. REV. STAT. § 131.515(2) (2008) ("No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are known to the appropriate prosecutor at the time of the commencement of the first prosecution and establish proper venue in a single court."); OR. REV. STAT. § 131.505(4) (2008) (defining "criminal episode" to mean "continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed at the accomplishment of a single criminal objective"). Oregon law differs from federal law in that respect. *See United States v. Dixon*, 509 U.S. 688, 704 (1993) (holding that the Fifth Amendment's Double Jeopardy Clause prohibits successive prosecutions only for the same offense).

When Oregon enacted its consecutive-sentencing statute, it supplanted traditional plenary judicial authority to impose a consecutive sentence with limited statutory authority. A mere verdict of guilt does not authorize a consecutive sentence for any offense. Rather, the judge needs to find additional facts about the commission of the offense. This Court must now decide whether Oregon's practice comports with the requirements of the Sixth Amendment's jury-trial guarantee. *See Crawford v. Washington*, 541 U.S. 36, 52 n.3 (2004) ("Any attempt to determine the application of a constitutional provision to a phenomenon that did not exist at the time of its adoption . . . involves some degree of estimation[.]").

This Court has made clear that the jury trial right attaches to facts that authorize or increase "punishment" for an offense and has faced the issue in the context of sentence length. Sentence length, however, is only the most common yardstick for measuring punishment. "Punishment" – the penalty that society authorizes for criminal transgressions – has included fines, whipping (and other corporal punishments), imprisonment, solitary confinement, hard labor, exile, and death. *See, e.g.*, 1 J. Archbold, PRACTICE, PLEADING AND EVIDENCE IN CRIMINAL CASES §§ 180 to 185-1 (Thomas W. Waterman ed., 6th ed. 1853). The jury-trial guarantee also applies to facts that change the nature of the punishment, such as from imprisonment to death. *Ring*, 536 U.S. at 609.

A sentence of imprisonment is punishment for a single offense whether the defendant serves the sentence concurrently with or consecutively to other sentences. When a conviction for which the judge imposes a concurrent sentence proves invalid, the concurrent sentence constitutes impermissible punishment that must be vacated along with the invalid conviction. *Rutledge v. United States*, 517 U.S. 292, 301-03 (1996); *Ball v. United States*, 470 U.S. 856, 864-65 (1985); *see also Putnam v. United States*, 162 U.S. 687, 714 (1896) (concurrent sentences are "distinct and separate as to each count"). In *Ball*, quoted with approval in *Rutledge*, the Court held that the remedy for the improper entry of separate convictions and concurrent sentences for "receiving" and "possessing" a firearm when Congress intended but one conviction, was to vacate one conviction and its concurrent sentence, because "[o]ne of the convictions, as well as its concurrent sentence, is unauthorized punishment for a separate offense." 470 U.S. at 864. Consequently, a judge's decision to impose a concurrent sentence never amounts to, as the State puts it, a "free crime." Cert. Pet. at 33. Rather, each conviction and sentence provides a separate *legal* justification for the government's infringement on the inmate's freedom.

Similarly, a consecutive sentence is punishment *only* for the offense to which the sentence attaches:

> [Imposing a consecutive sentence] is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other; but only provided, from the situation of the delinquent, to effectuate the punishment the Court thought his crime deserved.

Rex v. Wilkes, 19 How. St. Tr. 1075, 1133 (1769). Imposition of a consecutive sentence reflects a judge's determination of the appropriate punishment for the particular crime of conviction, independent from the appropriateness of the sentences imposed for other crimes of conviction.

As even the State acknowledges, this Court has concluded that a consecutive sentence constitutes punishment for a specific offense and *only* that offense. *Carter v. McClaughry*, 183 U.S. 365, 394 (1901). There, the Court distinguished consecutive sentences, which each constitute punishment for a separate offense, from recidivist sentences, for which the legislature provides enhanced punishment for a repeated offense: "Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one offense, may be authorized by statute." *Carter*, 183

U.S. at 394, *quoted in part in* Pet. Br. at 58.[5] In other words, a consecutive sentence is the punishment for a *single* offense, rather than augmented punishment because of the defendant's other offenses.

Should any doubt remain, the particularities of Oregon's consecutive sentencing statute clearly make consecutiveness an aspect of a sentence for a single offense. OR. REV. STAT. § 137.123(5)(a) (requiring findings for "*the criminal offense* for which a consecutive sentence is contemplated" (emphasis added)). Under Oregon law, a court does not impose an "aggregate sentence" but a discrete sentence for each count of conviction. Accordingly, the judge in this case made consecutiveness an aspect of the sentence only for counts 2, 4, and 5. J.A. 46-87 (judgment); *see also* J.A. 38-41 (sentencing hearing).

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[5] "Cumulative sentences" and "consecutive sentences" are synonymous terms. Arthur W. Campbell, LAW OF SENTENCING, § 9.20, at 413 & n.1 (3d ed. 2004). A "cumulative *punishment*," in contrast, is the legal term of art used to refer to the enhanced sentence imposed pursuant to a recidivist statute:

> It should be noted that there is a difference between "cumulative sentences," such as are pronounced upon a person under conviction at the same time of several offenses, and "cumulative punishment" which is an increased punishment inflicted for a second or third conviction, under habitual criminal acts.

State v. Hambly, 126 N.C. 1066, 35 S.E. 614, 615 (1900); *see also* BLACK'S LAW DICTIONARY 1398 (4th ed. 1951) (making same distinction when defining "cumulative punishment").

The State is mistaken, then, when it asserts that this Court's discussion of "aggregate punishment" in *Apprendi* implicates this case. Pet. Br. at 25. There, New Jersey argued that, even without the additional finding, state law gave the judge authority to impose consecutive sentences that would equal the aggregate punishment imposed. *Apprendi*, 530 U.S. at 474. The Court rejected that argument: "The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible, given that it was above the 10-year maximum for the offense charged in that count." *Id.* The possibility that the judge could have imposed the same "aggregate punishment" originally or upon resentencing was of no import. Rather, the issue was whether the trial court had imposed a sentence *on any individual count* that exceeded its authority. *See also Greene v. United States*, 358 U.S. 326, 328-29 (1959) (rejecting the Government's argument that distinct consecutive sentences, some for allegedly invalid convictions, were one "gross sentence" supported by other offenses sentenced concurrently, because, as stated in *Hill v. United States*, 298 U.S. 460, 464 (1936), "[t]he only sentence known to the law is the sentence or judgment entered upon the records of the court"). Similarly, the constitutional question in this case is

whether the judge exceeded his authority by imposing consecutive sentences on *each* of counts 2, 4, and 5.[6]

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[6] Similar fault inheres in the State's fleeting argument that *Lewis v. United States*, 518 U.S. 322 (1996), favors its position. There, the Court considered the scope of the Sixth Amendment *with respect to severity of the charges*. This Court had long held that the Sixth Amendment's jury-trial guarantee attaches only to "serious" rather than "petty" offenses. *See, e.g., Schick v. United States*, 195 U.S. 65, 70 (1904). From the conclusion that a "serious" offense carries a potential penalty of a significant period of confinement (or the requirement to serve hard labor, see *United States v. Moreland*, 258 U.S. 433, 437 (1922)), offenses were "petty" if the maximum potential sentence did not exceed six months. *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). *Lewis* presented the question whether the right to trial by jury applied in a prosecution for multiple "petty" offenses that carry a potential *aggregate* penalty exceeding six months. 518 U.S. at 326-27.

The Court decided that it did not:

> The Sixth Amendment reserves the jury trial right to defendants accused of serious crimes. . . . [W]e determine whether an offense is serious by looking to the judgment of the legislature, primarily as expressed in the maximum authorized term of imprisonment. Here, by setting the maximum authorized prison term at six months, the Legislature categorized the offense of obstructing the mail as petty. The fact that petitioner was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a serious one, to which the jury trial right would apply.

Id. at 327. The Court merely held that the Sixth Amendment attaches to "serious" offenses and not to "petty" offenses. Here, there is no question that the Sixth Amendment attaches to each of the six felony offenses.

3. A consecutive sentence is greater punishment than a concurrent sentence.

The Oregon Supreme Court held that "[i]t is self-evident" that a consecutive sentence is greater punishment than a concurrent sentence. *Ice*, 343 Or. at 266 n.5. The court's holding is consistent with this Court's observation that a concurrent sentence is imposed "as a *less* severe sanction than a consecutive sentence." *Ralston v. Robinson*, 454 U.S. 201, 216 n.9 (1981). In *Ralston*, the Court considered whether a judge, who was imposing a consecutive adult sentence on an offender already serving a Youth Correction Act (YCA) sentence, had authority to eliminate YCA treatment for the remainder of the YCA sentence. *Id.* at 203. The judge could have eliminated the treatment by imposing a *concurrent* adult sentence. *Id.* at 216-17. The Court reasoned:

> It would be anomalous to permit a concurrent sentence to modify the terms of the remainder of a YCA sentence but not to permit a consecutive term to have that effect, since a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence.

Id. at 216 n.9; *see also* Arthur W. Campbell, LAW OF SENTENCING § 9.20, at 413-14 (3d ed. 2004) ("Consecutive sentences follow one another seriatim. . . . By contrast, concurrent sentences, *regarded as less severe sanctions*, are served simultaneously. . . ." (emphasis added) (footnotes omitted)).

A consecutive sentence constitutes a valid exception to the common law rule "that unless interrupted by fault of the prisoner (an escape, for example) a prison sentence runs continuously from the date on which the defendant surrenders to begin serving it." *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir. 1994) (Posner, C.J.) The government generally cannot "delay the expiration of [a] sentence either *by postponing the commencement of the sentence* or by releasing the prisoner for a time and then reimprisoning him" in light of his interests in "the expiation of his debt to society and his reintegration into the free community." *Id.* (emphasis added). A court imposes a consecutive sentence upon its determination that the appropriate punishment for an offense requires the defendant to serve the sentence independently from other sentences, which delays the date the defendant can begin serving, and will be free from, that sentence.

A consecutive sentence also undeniably serves traditional societal goals of sentencing by extending the deprivations of liberty attendant to the term of incarceration. Sentences of incarceration serve various societal goals, including general and specific deterrence, incapacitation, rehabilitation, and retribution. *Ewing v. California*, 538 U.S. 11, 25 (2003); *Jones v. United States*, 463 U.S. 354, 368-69 (1983). A consecutive sentence is a greater deterrent to the defendant and others than a concurrent sentence; incapacitates the defendant longer; allows greater rehabilitative possibility; and pangs the defendant's

liberty interests with greater retribution. Simply put, a defendant who receives a consecutive sentence receives greater punishment *for a single offense* than a defendant who receives a concurrent sentence for the same offense.

4. In Oregon, a consecutive sentence exceeds the maximum punishment authorized by the jury verdict.

To echo this Court's reference to the words of Oliver Wendell Holmes, Jr., Oregon law threatened Respondent with certain pains if he did certain things. *See Apprendi*, 530 U.S. at 476 (quoting O. Holmes, THE COMMON LAW 40 (M. Howe ed. 1963)). It threatened him with a felony conviction and a lengthy sentence of incarceration *if* he committed first-degree sexual abuse.

Oregon law made additional threats regarding how he would serve that sentence *if* additional facts bearing on his culpability were present. It threatened, as an additional penalty, that he could be required to serve the sentence after serving sentences imposed for other offenses *if* he committed the sexual abuse during a separate criminal episode. OR. REV. STAT. § 137.123(1), (2). Even if he committed the sexual abuse during the same criminal episode as other offenses, it made the same threat *if* the commission either (a) indicated his willingness to commit a

second offense, (b) caused or risked causing a more serious harm than the other offense, or (c) harmed a different victim. OR. REV. STAT. § 137.123(4), (5). Under Oregon law, absent those facts, he was "*entitled*" to serve the sentence for sexual abuse at the same time that he served other sentences that the court imposed; in other words, he had "a legal *right* to a lesser sentence" absent the establishment of those additional factual accusations. *Blakely*, 542 U.S. at 309.

Here, the prosecution brought those factual accusations not to the jury, but to the judge. The statutory maximum sentence based solely on the jury verdict was a concurrent sentence for count 5 and for each of Respondent's other offenses. The judge, however, was satisfied that the prosecution had established those facts with respect to count 5, and carried out the law's threats by imposing a consecutive sentence. The judge did the same for counts 2 and 4. Consequently, Respondent must serve the 90-month sentence for count 5 after he has served the sentences on counts 1, 2, and 4. In contravention of his interests in "the expiation of his debt to society and his reintegration into the free community," he will be unable to begin his prison term for count 5 for more than twenty years. *Dunne*, 14 F.3d at 336. Respondent would be in a different place today (figuratively and literally) if the judge had imposed punishment based solely on the facts found by the jury. He would have already served his sentence

for count 5 (and each of the other five sentences in this criminal case) after 90 months.

The requirement of additional factfinding to impose a consecutive sentence implicates the jury's province of finding all facts that expose a defendant to the maximum penalty for an offense. Because Oregon law requires additional facts to authorize a consecutive sentence – thereby increasing the maximum punishment for an offense – the Sixth Amendment guaranteed Respondent the right to have a jury find those facts beyond a reasonable doubt.

CONCLUSION

In Oregon, the presumptive sentence of incarceration for an offense is a concurrent sentence. A consecutive sentence for an offense is an enhanced sentence that requires additional facts to justify its imposition. As in Respondent's case, the jury verdict authorized – at most – a concurrent sentence for each of his offenses. But the judge found additional facts to authorize the heightened penalties imposed on each of counts 2, 4, and 5. The Oregon Supreme Court properly followed the *Apprendi* rule when it concluded that the judge had exceeded his sentencing authority by relying on facts the jury did not find to increase the punishment for counts 2, 4, and 5. This Court should affirm its decision.

Respectfully submitted,

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REPLY BRIEF

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Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

REPLY BRIEF FOR THE STATE OF OREGON

On Writ of Certiorari to the
OREGON SUPREME COURT

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REPLY BRIEF FOR THE STATE OF OREGON

This Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and related cases is clear: the Sixth Amendment requires that any unadmitted fact (other than a prior conviction) that increases the penalty for a specific crime beyond the statutory maximum be submitted to a jury and proved beyond a reasonable doubt. This Court has applied the rule only in offense-specific cases and has not addressed its application to factfinding necessary for aggregate sentencing determinations. When confronted with that question, the Oregon Supreme Court simply extended the *Apprendi* rule to facts that authorize consecutive sentences—and thus increase the aggregate penalty for multiple crimes—without considering whether it was protecting any aspect of the historic jury role that the Framers meant to incorporate into the Sixth Amendment jury-trial guarantee.

But the *Apprendi* rule is grounded in history and the jury's traditional responsibility for determining whether the government has proven each element of a specific crime. To remain faithful to the Court's reasoning in *Apprendi*, any expansion of the Sixth Amendment jury-trial guarantee to consecutive-sentencing determinations must rest on a similar historic foundation. But there is no historic basis for extending *Apprendi* to the consecutive-sentencing determination, which—as respondent concedes—was entirely a judicial function and never involved the jury. The factfinding required by Oregon law merely constrains traditional judicial power without intruding on the jury's constitutionally protected domain. Consequently, the Sixth Amendment is not offended

when judges, rather than juries, decide whether to impose consecutive sentences for discrete crimes, even when that determination involves factfinding.

A. The parties' disagreement largely centers on whether this Court should extend the offense-specific *Apprendi* rule into aggregate sentencing determinations without first examining whether that result comports with the Framers' understanding of the jury-trial right.

The State began its opening brief with a detailed review of this Court's case law to highlight three main points. Pet. Br. 11-28. First, the Court has applied the *Apprendi* rule only in an offense-specific manner. The Court has not addressed its application to facts that pertain to the overall aggregate sentence or to the manner in which discrete sentences are served. Second, the rule is grounded in the Sixth Amendment right to have the jury determine each element of an offense beyond a reasonable doubt, which strongly suggests that the right is limited to offense-specific factfinding. Third, in analyzing the Sixth Amendment jury-trial guarantee, the Court consistently has focused on protecting the role of the jury as it existed when the Framers established that guarantee. The State then turned to the Constitutional text and history and demonstrated that the jury historically played no role in the consecutive-sentencing determination. Instead, those decisions always have been made by sentencing judges. Pet. Br. 29-52.

It may be helpful to identify the undisputed points before addressing the primary point of disagreement. The jury convicted respondent of six distinct offenses, and the trial court imposed a distinct sentence for each of the six convictions. It is undisputed that each distinct sentence is within the maximum authorized by the jury's guilty verdict on the corresponding offense. The trial court ordered four of those distinct sentences to run consecutively to each other, in accordance with a state statute that constrains inherent judicial consecutive-sentencing authority by requiring predicate factfinding in some circumstances. The question presented is whether the Sixth Amendment jury-trial guarantee required the jury, rather than the court, to find those unadmitted facts.

The parties agree that the jury historically played no role in determining how a defendant who was convicted of multiple offenses would serve the distinct sentences authorized by the jury's guilty verdicts. That determination always has been within the judicial power and not part of the jury's role. Pet. Br. 29-52, Resp. Br. 32. Both sides agree that the state statute requiring factfinding before imposition of consecutive sentences constrains "traditional plenary judicial authority." Resp. Br. 34; Pet. Br. 59. And, notwithstanding respondent's attempts to recast the State's argument as asserting something to the contrary (Resp. Br. 9, 18, 20, 30), both sides agree that this Court consistently has held that how a factfinding requirement is labeled does not control and that merely calling something a "sentencing factor" cannot remove it from the Sixth Amendment jury-trial guar-

antee.[1] *E.g.*, Pet. Br. 22, 24, 28; Resp. Br. 19, 26. Similarly, the State agrees with respondent's assertion that whether findings can be characterized as describing the "offense" or the "offender" does not resolve whether those findings are encompassed within the Sixth Amendment jury-trial guarantee. Resp. Br. 22.

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[1] Respondent quibbles with the State's use of the phrase "constitutional element" to capture the kind of factfinding encompassed in the *Apprendi* rule. Resp. Br. 2, 9, 18, 29-32. But other than a semantic disagreement, there is no real dispute between the parties that this Court's holdings have been directed to facts that function as "elements" of an offense—those facts that increase a defendant's criminal culpability and subject the defendant to a greater punishment for a specific offense. The labeling of those facts—whether as "elements," as "sentencing factors," or as something else—is irrelevant to the analysis. *See Ring v. Arizona*, 536 U.S. 584, 602 (2002) ("[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt"). All that matters is whether the fact *operates* as the functional equivalent of an element of a greater offense. *See id.* at 609 ("[b]ecause Arizona's enumerated aggravating factors operate as the functional equivalent of an element of a greater offense, the Sixth Amendment requires that they be found by a jury"; internal citation omitted).

Where the State and respondent part ways is with the appropriate consideration of history in resolving the issue presented. Respondent does not dispute the accuracy of the State's historical presentation. (*See* Resp. Br. 32, stating that "[r]espondent has no quarrel with the State's chronicle of consecutive sentencing practices through the ages"). Instead, he argues that the absence of any historical jury role in aggregate sentencing determinations is immaterial because *Apprendi* created a "functional" test, one that applies to any factual determination that increases the harshness of a defendant's overall punishment. *E.g.*, Resp. Br. 17, 19. Respondent chides the State for "retreating to historical practice" rather than simply "applying the functional rule of *Apprendi*." Resp. Br. 28. Thus, the disagreement in this case largely reduces to a single dispute: should the Court extend the *Apprendi* rule beyond the offense-specific context in which it previously has been applied to factfinding that affects only the manner in which a defendant will serve multiple discrete sentences, without considering whether that expansion is consistent with the Framers' understanding of the jury-trial right?

B. The *Apprendi* rule protects the jury-trial guarantee as the Framers would have understood that right and must be applied and limited accordingly.

The State looks to constitutional text and history to support its argument that the *Apprendi* rule should not be extended to factfinding related to aggregate sentencing determinations. It is undisputed that the jury's role historically was limited to deter-

mining each fact necessary to establish a conviction for a specific *crime* and that the jury played no role in deciding how multiple sentences would be served. Accordingly, there is no basis for the Oregon Supreme Court's extension of the *Apprendi* rule to factfinding necessary for imposition of consecutive sentences. The state court erred in concluding that *Apprendi* announced a broad "quantum of punishment" rule that applies with equal force to facts that increase the aggregate penalty, without first considering whether such facts historically fell within the jury tradition. *State v. Ice*, 343 Or. 248, 262-67, 170 P.3d 1049 (2007). Respondent endorses the Oregon Supreme Court's sweeping application of the *Apprendi* rule, divorced from any consideration of the jury's historic role.

Both the Oregon Supreme Court and respondent have overlooked this Court's consistent approach that grounds its interpretation of Sixth Amendment rights on a solid historical record. "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925). The *Apprendi* rule is predicated on a defendant's Sixth and Fourteenth Amendment rights to have a jury find, beyond a reasonable doubt, the elements of an offense (*i.e.*, the facts "'necessary to constitute the crime'"). *See Apprendi*, 530 U.S. at 476-78 (identifying those underlying constitutional principles). In *Apprendi*, the Court replaced its previous subjective, multi-factor test for determining the elements of a crime with an examination of the trial

practices that "existed during the years surrounding our Nation's founding," and it stressed the "historical foundation" for the rule. 530 U.S at 477-78. Although trial practices may evolve over time, "practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond a reasonable doubt." *Id.* at 483-84. This Court's analysis of those historic principles resulted in the *Apprendi* rule, which is based on the "historic link" between the verdict and the trial court's authority to impose a sentence for a crime. *Id.* at 476-84, 483 n. 10. *See also* 530 U.S. at 499-518, 500 n. 1 (Thomas, J., concurring) (looking to common law to determine what constitutes a "crime" and conducting exhaustive review of early American caselaw and authority to establish historical basis for *Apprendi* rule).

The *Apprendi* rule thus is limited by the Framers' understanding of the jury-trial right and is "rooted in longstanding common-law practice." *Cunningham v. California*, 170 S. Ct. 856, 864 (2007). "The Sixth Amendment jury trial right * * * does not turn on the relative rationality, fairness, or efficiency of potential factfinders." *Ring v. Arizona*, 536 U.S. 584, 607 (2002). Rather, the dispositive principle is "the Framers' paradigm for criminal justice." *Blakely v. Washington*, 542 U.S. 296, 313 (2004). And that paradigm, not a doctrinaire application of the *Apprendi* rule to other types of judicial factfinding, must guide resolution of this case.

Apprendi provides a bright-line test for identifying the constitutionally protected elements of an of-

fense—for identifying, in other words, which factual disputes a jury must resolve. "[W]hen the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict" and "fits squarely within the usual definition of an 'element' of the offense." *Apprendi*, 530 U.S. at 494 n. 19. The Court adopted the *Apprendi* rule to prevent States from disguising an element as a "sentencing factor," and to prevent them from effectively transforming a lesser crime into a greater crime without requiring a jury to find each element of that greater crime.

Adhering to its historic approach to Sixth Amendment questions, this Court has refused to extend the *Apprendi* requirements to circumstances beyond those that the Framers understood the jury-trial right to cover. In *Harris v. United States*, 536 U.S. 545 (2002), the Court addressed whether facts that trigger a mandatory minimum sentence are subject to *Apprendi*. In framing the analysis, the plurality explained that "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights." 536 U.S. at 557. The plurality concluded that the *Apprendi* rule did not apply to factual findings that resulted in a mandatory minimum sentence because those facts did not operate as historic elements that created greater offenses and application of the rule would not protect the jury's traditional role.

Id. at 560-69. And that was so regardless of whether the penalty involved a special stigma and punishment. *See id.* at 560 (if fact does not operate as element, "[i]t does not matter, for the purposes of the constitutional analysis" that the fact gives rise to special stigma and special punishment); *id.* at 566 ("[t]hat a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element").

Hence, the analysis in *Apprendi* and subsequent cases demonstrates that the pertinent question in this case is whether the Framers would have understood the jury-trial right as attaching to facts that determine when a defendant begins to serve his separate sentences for separate offenses, a question the State addressed in its opening brief and discusses further in the next section of this brief. No sound jurisprudential basis exists to expand the jury-trial protections beyond the Framers' understanding. Doing so would constitute an unwarranted encroachment on the State's broad, traditional authority to define crimes and to prescribe and administer the penalties for those crimes. *See McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) ("we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties"); *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[i]t goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"; internal citation

omitted); *cf. Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law").

Moreover, extending the *Apprendi* rule in the manner done by the Oregon Supreme Court and urged by respondent would call into question this Court's grounding of other aspects of the Sixth Amendment guarantee in history. For example, this Court has emphasized that approach in its recent Confrontation Clause cases, including *Crawford*, in which the Court read the clause "as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Crawford*, 541 U.S. at 54; *see Danforth v. Minnesota*, 128 S. Ct. 1029, 1035 (2008) (explaining that the *Crawford* Court "relied primarily on legal developments that had occurred prior to the adoption of the Sixth Amendment to derive the correct interpretation"); *see also Giles v. California*, 128 S. Ct. 2678, 2682 (2008) (framing confrontation issue as whether "the theory of forfeiture by wrongdoing [at issue] * * * is a founding-era exception to the confrontation right"). Nothing in the Oregon Supreme Court's analysis or respondent's argument offers a sound theoretical basis for departing from this Court's focus on history as key to construing the constitutional guarantees.

C. The *Apprendi* rule does not extend to consecutive sentencing.

1. The Framers would not have understood the jury-trial right to apply to the consecutive-sentencing determination.

The "Framers' paradigm for criminal justice" did not contemplate or suggest any role for the jury in determining when one sentence for one offense should commence in relation to a second sentence for a different offense. As the State demonstrated in its opening brief (Pet. Br. 29-52), the historical record provides no basis to conclude that the Framers would have understood the jury-trial right as extending to the consecutive-sentencing determination. The text of the Sixth Amendment (read together with the text of Article III) establishes that the jury-trial right attaches only to "crimes," and the general history surrounding the founding demonstrates that the Framers intended merely to enshrine the jury's role in determining a defendant's guilt for a specific crime. In addition, juries historically have played no role in consecutive sentencing. In both England and in this country, the jury's role traditionally was limited to determining all of the facts necessary to establish a single offense. The decision to impose consecutive sentences always was viewed as a judicial function and, in fact, the clear majority view has been that sentencing judges possess inherent authority to impose consecutive sentences. In short, the historical presumption has been that, when a defendant is convicted of separate offenses, he is subject to a separate penalty for each offense, and it is for the judge to de-

termine the manner in which the defendant serves those separate sentences.

It follows that the necessary historical basis to extend *Apprendi* to consecutive sentencing simply does not exist. The New Jersey statute at issue in *Apprendi* was deemed "an unacceptable departure from the jury tradition," *Apprendi*, 530 U.S. at 497, because it gave the court, instead of the jury, responsibility for determining whether the government had proved all the elements that were necessary to establish the maximum penalty for that specific crime. The "jury tradition," however, has never included factfinding to determine the manner in which separate sentences for separate crimes will be served. Rather, sentencing judges traditionally exercised inherent authority to make that determination after the jury has completed its role and found a defendant guilty of multiple crimes. The manner in which the facts of one crime might relate to the facts of another distinct crime historically has not been treated as an "element" of either crime or as creating "aggravated crimes." Indeed, several historical rules *prevented* prosecuting multiple crimes together. *See generally* Martin L. Friedland, DOUBLE JEOPARDY, 170-84 (1969) (discussing four historical impediments to prosecuting crimes together, including the doctrine of election which forced prosecution to elect to proceed on one felony at a time). Furthermore, the United States Constitution does not require separate crimes be tried together. *See United States v. Dixon*, 509 U.S. 688 (1993) (double jeopardy bars subsequent prosecution only if crimes have "same elements"). Given all of those considerations, it is difficult to envision how ju-

dicial factfinding to determine when a defendant begins to serve separate sentences for distinct crimes that happen to have been tried and sentenced together constitutes "an unacceptable departure from the jury tradition." *Apprendi*, 530 U.S. at 497.[2]

Because the Oregon consecutive-sentencing statute does not encroach on the jury's role, it reflects a permissible legislative choice to constrain judicial discretion in imposing consecutive sentences. In the absence of that statute, the judge would have had in-

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[2] Respondent asserts that the State resurrects a history argument that Justice Breyer advanced, and that this Court rejected, in *United States v. Booker*, 543 U.S. 220 (2005). Resp. Br. 20-22. Respondent is mistaken. In *Booker*, Justice Breyer argued that there was no historical foundation for the *Apprendi* rule. *See Booker*, 543 U.S. at 327-29 (Breyer, J., dissenting) (making that argument). The State does not make that argument here. To the contrary, the State embraces the historical basis for the *Apprendi* rule. The historical record identified in *Apprendi* established that facts that increase the maximum sentence for an individual "crime" were historically considered "elements" of the offense and were covered by the jury-trial guarantee. *See Apprendi*, 530 U.S. at 476-84, 483 n. 10 (discussing historical record); *id.* at 501-18 (Thomas J., concurring) (same). The State's point here is that there is no comparable historical record for untethering the *Apprendi* rule from its offense-specific foundation, and for extending that rule to findings that increase the aggregate sentence for multiple crimes.

herent authority to determine whether respondent should serve the six discrete sentences consecutively or concurrently. *See State v. Jones*, 250 Or. 59, 61, 440 P.2d 371 (1968) (in the absence of a statute governing consecutive sentences, Oregon trial courts have inherent authority to impose consecutive sentences). The Sixth Amendment is not offended by a statutory provision like that at issue, which recognizes that inherent judicial authority while simultaneously placing limits upon it. "[B]y its terms," that constitutional provision "is not a limitation on judicial power, but a reservation of jury power." *Blakely*, 542 U.S. at 308. "It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." *Id.* So, too, the Sixth Amendment limits legislative power only to the extent that the exercise of that power infringes on the province of the jury. Because Oregon's statute does not infringe on the jury's province, it does not implicate the Sixth Amendment jury-trial guarantee.

Consequently, it is the Oregon's Supreme Court's "quantum of punishment" rule—and not Oregon's consecutive-sentencing statute—that constitutes an "unacceptable departure" from "tradition." The state court's rule lacks support in the constitutional text and historical record and threatens to transform into jury issues a wide range of aggregate, collateral and "downstream" sentencing factual determinations (including those made in the probation, parole, and prison contexts) that traditionally have fallen to others. *See State v. Allen*, 2008 Tenn Lexis 419, *50-*52 (Tenn. S.C. 2008) (holding that *Blakely* does not apply to consecutive-sentencing decision and analogizing

consecutive sentencing to decisions about "how and where a defendant serves his sentences: on probation, on community corrections, in split confinement, or in the penitentiary"); *see also* States' *Amici Curiae* Br. 10-14 (exploring various implications for probationary determinations, eligibility for sentence modification programs, and mandatory-minimum statutes). Yet nothing in the historical record demonstrates that the jury must play a role in deciding all facts that increase the "quantum of punishment" or facts that determine when one sentence should commence in relation to another. The Oregon Supreme Court misapplied the *Apprendi* rule in holding otherwise.

2. Consecutive sentences do not increase the penalty for the individual "crime" or create aggravated crimes with additional elements for *Apprendi* purposes.

Respondent carves out a fall-back position. He contends that the imposition of consecutive sentences increases the penalty for each individual crime. Resp. Br. 32-42. He points to language from *Raltson v. Robinson*, 454 U.S. 201, 216 n. 9 (1981), in which this Court noted in a footnote that "a concurrent sentence is traditionally imposed as a *less* severe sanction than a consecutive sentence." (Emphasis in original). Respondent concludes that the imposition of consecutive sentences thus is subject to the *Apprendi* rule *even if* that rule is offense-specific.[3]

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[3] That was not the basis for the Oregon Supreme Court's decision below. That court clearly concluded that consecutive sentencing *does not* increase the

Respondent's argument fails for the reason that has already been identified—the Framers would not have viewed the decision to impose consecutive sentences as part of the jury-trial right. The State does not dispute that consecutive sentences are "harsher" in the sense that they lead to a longer overall punishment. But that fact is unremarkable and merely frames, rather than answers, the question presented here. The issue is whether the Framers would have viewed consecutive sentencing as increasing the penalty for any individual "crime" by essentially creating an "aggravated crime," one with an additional element that implicates the Sixth Amendment jury-trial right.

For the reasons explained above and in the State's brief on the merits, the Framers would not have viewed it that way. The Framers' understanding of facts that constitute the "crime" simply did not extend to facts that determine when once sentence commences in relation to another. The historical view has been that separate convictions authorize separate penalties, and that a court has inherent authority to impose consecutive sentences. The imposition of a consecutive sentence was not viewed as increasing

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penalty for the individual crimes. The court framed the issue as "[d]oes the *Apprendi* rule apply to * * * factual findings that do not increase the sentence for any individual count but that authorize imposition of consecutive sentences?" *Ice*, 343 Or. at 264. The court held that the rule was "*not* offense specific but that [the] focus, instead, [was] on the quantum of punishment." *Id.* at 265 (emphasis in original).

the punishment for the individual "crime" but simply flowed from the fact that a defendant had committed multiple crimes leading to multiple punishments. *See e.g., Rex v. Wilkes*, 19 How. St. Tr. 1075, 1134 (H.L. 1769) (explaining that consecutive sentences do "not let[] the judgment for the first offense vary the punishment, or influence the quantum of it in the other," but instead "effectuate the punishment the Court thought [the] crime deserved," and explaining that "the necessity of postponing the commencement" of sentence for second crime "arises from the party's own guilt" for first crime that led to first sentence); *Kite v. Commonwealth*, 52 Mass. 581, 585, 11 Met. 581 (1846) ("there is no other mode in which a party may be sentenced on several convictions"). Whether or not consecutive sentences are imposed, the penalty for each individual crime remains the same.

Consecutive sentences historically were viewed as necessary to give meaning to a jury's finding of guilt on multiple crimes. Conversely, concurrent sentences were thought to effectively nullify the jury's guilty verdict on the second charge. *See e.g., Connecticut v. Smith*, 5 Day 175, 179 (1811) (consecutive sentencing "prevent[s] the previous conviction from operating as an exemption from punishment[]for a subsequent offense"); *Russell v. Commonwealth*, 7 Serg. & Rawle 489, 490 (1822) ("Would it not be absurd, to make one imprisonment, a punishment for two offenses?"); *Williams v. State of Ohio*, 18 Ohio St. 46, 48 (1868) (concurrent sentencing would nullify conviction). The fact that offenses arose out of the same transaction was viewed as a matter of discretionary mitigation that could be argued to the trial court in an attempt to in-

fluence the court's exercise of its authority to impose consecutive or concurrent sentences. *See* 1 J. Bishop, NEW CRIMINAL PROCEDURE § 1327(2), 815 (4th ed. 1895) (if court has consecutive-sentencing authority, "it will consider *in mitigation* such a fact as that the several offenses occurred in what was actually or substantially one transaction"; footnote omitted and emphasis supplied).

Accordingly, the historical view has been that, although consecutive sentencing has a substantial, practical impact on the amount of time that a defendant will be required to serve, the die is cast when a jury convicts a defendant of multiple crimes. At that point, in other words, the jury already has authorized the maximum punishment for each of the crimes. As a result, although consecutive sentences increase a defendant's aggregate punishment, they do not exceed the statutory maximum for any of the underlying individual offenses, because the jury convicted him of more than one crime.

The problem in *Apprendi*, *Blakely* and related cases was that the statutes at issue allowed judges to impose a sentence for a *specific* conviction that was greater than the jury's verdict authorized. As the Tennessee Supreme Court recently explained, those sentencing schemes "disguised" elements of crimes as "sentencing factors," with governments "effectively turning a lesser crime into a greater crime not by adding an element that must be charged and put to the jury, but by allowing a judge to find 'sentencing factors' after conviction of the lesser crime." *Allen*, 2008 Tenn Lexis at *40. Oregon's consecutive-

sentencing statute does not raise that concern, however, because the judicial factfinding that it requires does not increase the penalty for the individual "crime" or result in an "aggravated crime." Indeed, as respondent explains, "[a] sentence of imprisonment is punishment for a single offense whether the defendant serves the sentence concurrently with or consecutively to other sentences" and, under Oregon law, a court imposes "a discrete sentence for each count of conviction." Resp. Br. 35, 37.

It bears emphasis that the State's argument maintains the bright-line simplicity of the *Apprendi* rule. The argument merely underscores a critical aspect of that rule and ties it to its historical foundation. Other than the fact of a prior conviction, any fact that increases the penalty for *a crime* beyond the prescribed statutory maximum must be proved to a jury beyond a reasonable doubt. Once the penalty for each crime is established in a manner that fully complies with the *Apprendi* rule, other decisions about how those penalties are to be administered—particularly in relationship to each another—remain within the judicial power and do not involve the jury function. Therefore, state statutes—like the Oregon statute at issue here—that recognize that traditional judicial authority, while simultaneously placing limitations upon it, do not implicate the Sixth Amendment jury-trial guarantee. The rule from *Apprendi* is offense-specific in scope. It does not extend to factfinding required for consecutive-sentencing determinations that govern when one discrete sentence commences in relation to another discrete sentence.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, this Court should reverse the judgment of the Oregon Supreme Court.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

vs.

THOMAS EUGENE ICE,

Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Blakely* v. *Washington*, 542 U. S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The line of cases beginning with *Apprendi* v. *New Jersey* has caused enormous disruption of systems of

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

sentencing established through broad, bipartisan consensus, with little or no gain in terms of fairness, accuracy, or even-handedness. This price may have been worth paying to protect the historical right of jury trial from encroachment, but the price was high nonetheless. There is no justification for spreading this damage into areas where the historical right of jury trial did not reach. The decision to sentence concurrently or consecutively for multiple offenses is one such area. Such a needless extension of the *Apprendi* rule would be contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The facts are stated in the opinion of the Supreme Court of Oregon, *State* v. *Ice*, 343 Ore. 248, 250-251, 170 P. 3d 1049, 1050 (2007):

> "Defendant managed an apartment complex where the 11-year-old victim, her mother, and younger brother lived. On two occasions, defendant entered into the family's apartment at night. On each occasion, defendant went into the victim's bedroom and touched her breasts and then her vagina.
>
> "Based on those acts, a grand jury indicted defendant for committing six crimes. The indictment alleged that defendant twice committed first-degree burglary by entering the victim's apartment with the intent to commit sexual abuse. The indictment also alleged that, during each burglary, defendant committed two acts of first-degree sexual abuse; specifically, the indictment alleged that, on each occasion, defendant touched the victim's breasts and then her vagina. Defendant pleaded not guilty. The case was tried to a jury. After consider-

ing the evidence, the jury convicted defendant of all six charges.

"Before the sentencing hearing, the parties submitted sentencing memoranda. Regarding the length of the sentences, the state recommended that the trial court impose enhanced or upward departure sentences on the two burglary convictions and also on the two sexual abuse convictions based on touching the victim's vagina. It did not argue that the court should impose departure sentences on the two sexual abuse convictions based on touching the victim's breasts. With respect to the separate question of whether the sentences should run concurrently or consecutively, the state contended that there were two separate criminal episodes based on the two burglaries and that the sentences arising out of each of those criminal episodes should run consecutively to each other. The state also argued that, within each of the two criminal episodes, the sentence for sexual abuse based on touching the victim's vagina should run consecutively to the sentence for burglary. It recommended, however, that the sentences for sexual abuse based on touching the victim's breasts should run concurrently with the sentences for sexual abuse based on touching the victim's vagina.

"In his sentencing memorandum, defendant did not address whether the court should impose departure sentences. Regarding consecutive sentences, defendant agreed that there were two criminal episodes and that ORS 137.123(2) would permit the trial court to impose the sentences arising out of the second episode consecutively to the sentences arising out of the first episode. Defendant noted, however (and the state agreed), that the trial court could impose consecutive sentences *within* each

episode only if it made certain factual findings set out in ORS 137.123(5)."

Before Ice's sentencing hearing, this Court issued its opinion in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). Ice filed a supplemental memorandum citing *Apprendi*'s rule that a jury must determine the facts of a crime and "the jury must also consider any factors which may result in a sentence more severe than contemplated by statute." *Id.*, at 251, 170 P. 3d, at 1051.

At the sentencing hearing Ice argued, contrary to his statement in his sentencing memoranda, that under Oregon's constitution a jury had to resolve whether the two convictions for burglary arose out of separate criminal episodes. *Id.*, at 252, 170 P. 3d, at 1051. The sentencing judge rejected the argument and adopted the state's recommendations. *Ibid.*

The judge decided that Ice's sentences for the first burglary charge, and the first sexual abuse conviction for touching the victim's vagina would be served consecutively, making the findings of both "willingness to commit more than one criminal offense" and "greater, qualitatively different . . . harm to the victim . . . ." *Id.*, at 252-253, 170 P. 3d., at 1051. Either finding would have been sufficient to authorize consecutive sentences under Ore. Rev. Stat. § 137.123(5). The court ordered the sentence for touching the victim's breasts run concurrently with the sentence for touching the victim's vagina. *Id.*, at 253, 170 P. 3d, at 1051.

The court then found the second burglary to be a "second separate incident" and ordered the sentence on that conviction to run consecutively to the other sentence. *Ibid.*; see Ore. Rev. Stat. § 137.123(2). The sexual abuse sentence for touching the victim's vagina was ordered to be served consecutively, with the sen-

tence for touching the victim's breasts to run concurrently. *Ice*, 343 Ore., at 252, 170 P. 3d, at 1051-1052. With upward departures and consecutive terms, Ice was sentenced to serve a total of 28 years, 4 months. Pet. for Cert. 5.

Ice appealed, alleging the trial court had violated his federal and state constitutional rights by making the upward departures and by ordering that four of his sentences run consecutively and not concurrently. *Ice*, 343 Ore., at 253, 170 P. 3d, at 1052. The Oregon Court of Appeals affirmed the trial court's decision without an opinion. *State* v. *Ice*, 178 Ore. App. 415, 39 P. 3d 291 (2001) (table).

The Oregon Supreme Court granted discretionary review. See *Ice*, 343 Ore., at 250, 170 P. 3d, at 1050. The state high court found that the objection to the upward departures was defaulted. *Id.*, at 253-254, 170 P. 3d, at 1052. The court also rejected the state constitutional argument on the merits. *Id.*, at 261-262, 170 P. 3d, at 1056. However, the Oregon Supreme Court found re-sentencing was warranted in Ice's case because of the rules established by this Court's decisions in the *Apprendi* line of cases. *Id.*, at 265, 170 P. 3d, at 1058. The Oregon Supreme Court held that the "judicial factfinding" that allowed the judge to impose consecutive sentences violated *Apprendi* and *Blakely* principles because they exposed Ice "to a greater punishment than that authorized by the jury's guilty verdict." *Id.*, at 265-266, 170 P. 3d, at 1058.

This Court granted certiorari on March 17, 2008, to address whether the Sixth Amendment is violated by a judge's finding of the facts required by state law for the imposition of consecutive sentences.

SUMMARY OF ARGUMENT

The rule of the *Apprendi* line of cases—that a fact that raises the ceiling on the maximum punishment must be found by the jury—must be understood in the context of the purpose of the rule. That purpose was to protect the right of jury trial from encroachment by modern sentencing systems that allow judges to effectively convict the defendant of a higher degree of offense. The *Apprendi* rule should not be extended to areas where there is no danger of such encroachment.

The decision to run multiple sentences consecutively was entirely for the court at common law in England and during the Founding era in America. The jury had no role in this decision.

In *Blakely* v. *Washington*, this Court settled on a bright-line rule to avoid the problem of the slippery slope presented by the dissent's proposal. For consecutive sentencing, the slope is not slippery. Consecutive sentencing is a self-contained area with no danger of encroaching on the traditional function of the jury.

The fact that the State of Oregon has chosen to place restraints on the traditionally unlimited discretion of the sentencing court should not change the result. It is perverse to say that a state's voluntary decision to add protections for the defendant—requiring certain facts be found before consecutive sentences may be imposed—automatically imposes the burdens of having those facts found by juries and proved beyond a reasonable doubt. The state may react by repealing that protection, as California did for upper-term sentencing after *Cunningham*.

ARGUMENT

I. The purpose of the *Apprendi* bright-line rule is to protect the historical function of the jury from encroachment, and the rule should not be applied where that purpose is not served.

A. The Apprendi Rule.

> "The *historic* link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the *novelty* of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi* v. *New Jersey*, 530 U. S. 466, 482-483 (2000) (emphases changed; footnote omitted).

After *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for *a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.*, at 491 (emphasis added). But to say that this rule applies to a sentencing procedure that allows a sentencing judge to impose consecutive sentences for *multiple crimes* is to take the *Apprendi* rule out of its context of preserving the jury's historical role against the encroachment of modern innovation.

Apprendi prohibits sentencing systems that allow judges to find factors that are the functional equivalent of elements of an offense. In *Apprendi* itself, the sentencing factor, in effect, took the single offense from a statutorily defined second-degree felony to a first-degree felony. *Id.*, at 494-495. The factor was "perhaps as close as one might hope to come to a core criminal offense 'element.' " *Id.*, at 493 (footnote omitted). This

is not the equivalent of allowing a sentencing judge to impose consecutive sentences for multiple offenses.

New Jersey's criminal statutes penalized possession of a firearm for an "unlawful purpose" as a "second-degree" offense. *Id.*, at 468. A second-degree offense was punishable by imprisonment " 'between five years and 10 years.' " *Ibid.* (quoting N. J. Stat. Ann. § 2C:43-6(a)(2) (West 1995)). At the time of Apprendi's sentence, New Jersey's criminal code allowed the judge to impose an "extended term" of imprisonment "if the trial judge finds, by a preponderance of evidence, that '[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.' " *Id.*, at 468-469 (quoting N. J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999-2000)). The imposition of an extended term could increase the defendant's sentence "between 10 and 20 years." *Id.*, at 469 (quoting N. J. Stat. Ann. § 2C:43-7(a)(3)). In imposing the extended term for a single offense, a trial judge was, in fact, "impos[ing a] punishment identical to that New Jersey provides for crimes of the first degree" based on a judge's finding of the defendant's "purpose" or mental state. *Id.*, at 491. This Court found fault with this practice because the jury had only convicted the defendant for the second-degree offense of "possession of a firearm." *Ibid.* The Sixth Amendment prohibited the effect of punishing for a single first-degree offense when the jury had not found the defendant guilty of a first-degree offense. See *id.*, at 491-492.

This enhanced sentence for a single crime is fundamentally different from a sentencing judge's choice regarding whether to give the defendant a "cheaper by the dozen" discount on multiple crimes. Traditionally, a trial judge has always been able to impose consecutive

sentences for separate crimes when the jury has found the defendant guilty of each separate crime beyond a reasonable doubt. While the result of consecutive sentences may be a longer term of punishment, the Sixth Amendment was not originally understood to require jury involvement in this decision. See Part II, *infra*. In each case in the *Apprendi* line, this Court has found that the defendant's constitutional rights were violated when a judge imposed a sentence for a single crime greater than the maximum he could have imposed for that crime, "without the challenged factual finding." See *Blakely* v. *Washington*, 542 U. S. 296, 303 (2004).

The Oregon Supreme Court read *Apprendi* and *Blakely* to prohibit " 'expos[ing a] defendant to a greater punishment than that authorized by the jury's guilty verdict,' *Apprendi,* 530 U. S., at 494, based on judicial fact-finding . . . ." *State* v. *Ice*, 343 Ore. 248, 266, 170 P. 3d 1048, 1058 (2007) (footnote omitted). Application of *Apprendi* and *Blakely*'s rules in such a manner is incorrect. This interpretation of the post-*Apprendi* Sixth Amendment right lifts *Apprendi* out of context. The underlying concern of *Apprendi* and *Blakely* was "the need to give intelligible content to the right of a jury trial" for a crime. See *Blakely*, 542 U. S., at 305. This is done so long as each fact setting the punishment ceiling for a *single* offense is submitted to a jury. See *United States* v. *Booker*, 543 U. S. 220, 230 (2005) (" 'sentencing ceiling' "); *Washington* v. *Recuenco*, 548 U. S. 212, 220 (2006) (sentencing factors subject to *Apprendi* are equivalent to elements of offenses). So long as each ceiling-raising sentencing factor for a single offense is submitted to the jury, the jury performs as the check on judicial power that the Sixth Amendment right to a jury was intended to provide. See *Blakely*, *supra*, at 306.

Apprendi and *Blakely* do not address multiple verdicts. The decisions involve a single verdict, operating alone, for a single charged offense. See *id.*, at 299, n. 2, and 300. Therefore, where a sentence for "second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping," the sentence unconstitutionally impinged on the role of the jury. See *id.*, at 307.

The consecutive sentences imposed by the trial court in the present case did not infringe on the historical Sixth Amendment role of a jury as envisioned in *Blakely* or *Apprendi*. The Oregon statute merely provides structure for a decision that has always been one for the judge and not the jury. The defendant may be punished for each crime he committed—as opposed to being punished for one and getting off scot free for the others—if (1) the crimes are not part of a continuous, uninterrupted course of conduct; (2) the additional crime was not incidental but showed a willingness to commit more than one crime; or (3) the additional crime caused greater or different loss to the victim. See Ore. Rev. Stat. §§ 137.123(2) and (5). These determinations all involve relationships between crimes and do not resemble elements of crimes traditionally found by the jury.

B. Booker and Cunningham.

This Court's decision in *United States* v. *Booker* does not support the Oregon Supreme Court's interpretation that *Apprendi* and *Blakely* are meant to prohibit "sentencing schemes that permit or require judges to impose sentences that are *longer* than sentences that a jury's verdict alone would authorize," *Ice*, 343 Ore., at 264, 170 P. 3d, at 1057 (emphasis in original), as applied to consecutive sentences for multiple offenses. Like the other cases in the line, *Booker* concerns the

extent of the Sixth Amendment's protection for a single charged offense. See *Booker*, 543 U. S., at 227-228. In *Booker*, both defendants received enhanced sentences for a single crime. *Ibid.* Booker had been charged with possession with the intent to distribute at least 50 grams of cocaine base. *Id.*, at 227. The jury found him guilty of a single offense under 21 U. S. C. § 841(a)(1). *Ibid.* Under the statute, this conviction carried with it "a minimum sentence of 10 years in prison and a maximum sentence of life . . . ." *Ibid.* However, for the bare offense, the Sentencing Guidelines required the trial court "to select a 'base' sentence of no less than 210 nor more than 262 months in prison." *Ibid.* Then, in a post-sentencing proceeding, the trial judge found that Booker was in possession of 556 grams of crack and that he had obstructed justice. *Ibid.* Based on this finding, the Sentencing Guidelines required the judge to "select a sentence between 360 months and life imprisonment." *Ibid.*

Fanfan, the other *Booker* defendant, was convicted for "conspiracy with intent to distribute and to possess with intent to distribute at least 500 grams of cocaine in violation of 21 U. S. C. §§ 846, 841(a)(1), and 841(b)(1)(B)(ii)." *Id.*, at 228. "Under the Guidelines, without additional findings of fact, the maximum sentence authorized by the jury verdict was imprisonment for 78 months." *Ibid.* However, in a separate sentencing hearing, the trial judge found Fanfan was responsible for 2.5 kilograms of cocaine powder and 261.6 grams of crack, and that Fanfan "had been an organizer, leader, manager or supervisor in the criminal activity." *Id.*, at 228. Under the Guidelines, these facts "required an enhanced sentence of 15 or 16 years instead of the 5 or 6 years authorized by the jury verdict alone." *Ibid.*

The Court's decision was derived from the principle "that the 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the *elements* of the crime with which he is charged.' " *Id.*, at 230 (quoting *United States* v. *Gaudin*, 515 U. S. 506, 511 (1995)) (emphasis added). Booker and Fanfan's sentences were invalid, not simply because they were "longer," but because the judge had single-handedly convicted the defendants of what amounted to a greater offense. See *id.*, at 235 (judge found greater quantity of drugs than found by jury). The principle of *Booker* is not inconsistent with the imposition of consecutive sentences by a trial judge exercising his traditional, discretionary role, even when the result is a longer term of punishment, but instead is based on the need to preserve the significance of "the jury's finding of the underlying crime." See *id.*, at 236.

Cunningham v. *California*, 549 U. S. 270, 127 S. Ct. 856 (2007), has not altered or added new dimensions to *Apprendi*'s Sixth Amendment rule. *Cunningham* addressed the conviction and sentence for a single offense of "continuous sexual abuse of a child under the age of 14." *Id.*, 127 S. Ct., at 860. At the time of his conviction, California sentencing law "obliged the trial judge to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation." *Ibid.* If the trial judge found facts in aggravation, the judge could enhance Cunningham's sentence and impose the "upper term sentence of 16 years." *Id.*, at 860-861.

At issue in *Cunningham* was whether the defendant's sentence reflected the "elements" of the crime as found by the jury. Under California's Determinate Sentencing Law (DSL), the judge, and not the jury, was allowed to impose an upper-term sentence if he found facts beyond those "element[s] of the charged offense,

essential to a jury's determination of guilt, or admitted in a defendant's guilty plea." See *id.*, at 868. Under California's sentencing scheme, an upper-term sentence for a single crime could be imposed by the trial judge based on "facts found discretely and solely by the judge." *Ibid.* The longer sentence imposed by the court was unconstitutional because the defendant's right to have the functional equivalent of elements of the charged offense found by a jury had been violated. *Ibid.*

To say that *Apprendi*'s bright-line rule was violated by California's DSL simply because it allowed a judge to impose a longer term of punishment is to remove *Apprendi* and *Cunningham* from the context in which they were decided. " 'Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime—and thus the domain of the jury—by those who framed the Bill of Rights.' " *Id.*, at 864 (quoting *Harris* v. *United States*, 536 U. S. 545, 557 (2002) (plurality opinion)). Words must be understood in context. See *United States* v. *Santos*, 553 U. S. __ (No. 06-1005, June 2, 2008) (slip op., at 4) (plurality opinion); *Ali* v. *Federal Bureau of Prisons*, 552 U. S. __, 128 S. Ct. 831, 849-850 (2008) (Breyer, J., dissenting). The context of the *Apprendi-Blakely* bright-line rule is sorting out which sentencing factors would have been considered elements in the founding era. Language lifted from those opinions should not be applied mechanically to factual determinations that obviously would not have been considered elements at that time.

Apprendi was meant to preserve the traditional role of the jury to find every element of the single offense for which the defendant was charged. A sentence for a single offense departs from that tradition when the judge was allowed to find facts that in effect held the

defendant guilty for a greater offense. This is because, according to *Apprendi* and this Court's later holding in *Washington* v. *Recuenco*, 548 U. S. 212, 220 (2006), "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." *Apprendi*, 530 U. S., at 478 (footnote omitted). Accordingly, any "sentencing factor" that led to punishment for the functional equivalent of a higher offense has to be treated as an "element" of a crime and submitted to a jury. *Recuenco*, *supra*, at 220.

It would be an error to lift the "fact essential to the punishment" rule from the *Apprendi* line and apply it to the timing of punishment for multiple offenses. To do so would be to interpret *Apprendi*, *Blakely*, *Booker*, and *Cunningham* to prohibit the traditional role of a sentencing judge to use his discretion to impose consecutive sentences. In Oregon, judicial discretion to impose consecutive sentences is not done "at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty" for a single conviction. *Blakely*, 542 U. S., at 309. The statute relating to concurrent and consecutive sentences grants "the court . . . discretion to impose consecutive terms of imprisonment for *separate convictions*." When the "separate convictions" arose out of a "continuous and uninterrupted course of conduct," the court must find that the separate criminal offense, and resulting "separate convictions," were either indicative of the defendant's willingness to commit more than one crime or "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim . . . ." See Ore. Rev. Stat. § 137.123(5)(a) and (5)(b). This sentencing discretion is authorized only after the jury has found all the "facts essential to lawful imposi-

tion of the penalty" of each separate conviction. Cf. *Blakely*, *supra*, at 309. The resulting longer punishment does not take away from the jury's traditional role of finding all facts determining the degree of each offense.

II. At common law and in early America, the jury had no role in the decision of whether sentences for multiple crimes would be served consecutively, and the Sixth Amendment jury trial right therefore does not extend to that decision.

"[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power." *Blakely* v. *Washington*, 542 U. S. 296, 308 (2004). Consecutive sentencing has long been a discrete consideration by the trial judge, exercised after the jury has reached its verdicts on the merits. A judge's ability to choose concurrent or consecutive sentences was clear "during the years surrounding our Nation's founding." Cf. *Apprendi* v. *New Jersey*, 530 U. S. 466, 478 (2000). There need be no concern that allowing the judge to find the facts required for consecutive sentences will erode the jury power reserved by the Sixth Amendment.

A. Common Law.

At common law, multiple count indictments were not unusual. See Note, "Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties," 67 Yale L. J. 916, 920, n. 17 (1958) ("Yale Note") (citing 2 M. Hale, Pleas of the Crown 173 (Wilson ed. 1778); 1 J. Chitty, Criminal Law 168-172 (1819)). And while consecutive sentencing was possible, see, *e.g.*, *Rex* v. *Williams*, 168 Eng. Rep. 366, 370 (1790), it was generally unnecessary because of the

capital nature of most offenses. Because all felonies were punishable by death and benefit of clergy was only available for the first offense, see Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Ring* v. *Arizona*, No. 01-488, pp. 4-5, it was typically unnecessary to impose more than one sentence of imprisonment. In America, the common law system of felony sentencing was replaced by reform legislation in most states shortly after the Founding, and imprisonment became the usual punishment for most felonies. See King, The Origins of Jury Sentencing in the United States, 78 Chicago-Kent L. Rev. 937, 937 (2003).

"[W]hen there are two or more convictions, on which sentence remains to be pronounced; the judgment of the court may direct that, each succeeding period of imprisonment shall commence on the termination of the next preceding one." 1 J. Bishop, Commentaries on the Criminal Law § 636, p. 527 (1st ed. 1856).

Wilkes v. *Rex*, 2 Eng. Rep. 244 (H. L. 1769), demonstrates the trial judge's power to impose consecutive sentences for two separately charged crimes. *Id.*, at 248-249. John Wilkes was accused of "audaciously, wickedly, and seditiously" speaking out against the King "to impeach and disparage his veracity and honor, and to represent and cause it to be believed amongst his Majesty's subjects, that his said most gracious speech contained falsities and gross imposition upon the public . . . ." *Id.*, at 244-245. Wilkes was then accused of printing and publishing "a certain malignant, seditious, and scandalous book and libel." *Id.*, at 245. Wilkes was charged for both offenses, and convicted. *Ibid.* He was sentenced to pay a fine of £500 and to serve 10 months in custody of the Marshal. *Ibid.* At the time of the conviction, Wilkes had also been charged and convicted for "publishing an obscene and impious libel entitled 'An Essay on Woman.' " *Ibid.* He was sentenced to pay

another fine of £500, and imprisoned for 12 months, "to be computed from the determination of the first imprisonment." *Ibid.* Wilkes challenged his sentence, in part claiming that judgments at law must take immediate effect because they constrained the liberty of the defendant. *Id.*, at 247. Wilkes claimed, in particular, that because it was uncertain when the first imprisonment would end, it was unlawful to impose the 12-month sentence "from the determination of the first imprisonment." *Ibid.*

The House of Lords rejected Wilkes' challenge. *Id.*, at 248. "It would have been absurd to have made the imprisonment commence immediately, Mr. Wilkes being already under another sentence of imprisonment for ten months; and, in that case, would in effect have only suffered an imprisonment of two months; when the Court, on account of the enormity of the offence, intended he should be imprisoned twelve months . . . ." *Ibid.* "Under the circumstances of this case, there was no incongruity in the imprisonment commencing at a future time; and if there was any novelty in it, it was to be attributed to the accumulated guilt of its object." *Ibid.*

B. Early American Cases.

Early American courts also found no novelty in imposing consecutive sentences. It was not uncommon for judges to impose consecutive sentences for crimes committed by prisoners who had been indicted and convicted for more than one crime. See, *e.g.*, *Commonwealth* v. *Leath*, 3 Va. 151, 1 Va. Cas. 151 (1806). In *Leath*, prisoners Peter Leath and Heartwell Leath had both been indicted, convicted, and sentenced to two years imprisonment "for the offence of malicious stabbing of A.B. on the 19th of February, 1805 by the District Court of Petersburg . . . ." *Ibid.* Both prisoners

were also indicted for the felonious and malicious stabbing of John Williams and Turner Fear on February 19th. *Id.*, at 151-152. Another indictment was also found against Heartwell for the malicious stabbing of Daniel Lyon, and Peter Leath was indicted for the "same crime against two other persons on the same day." *Id.*, at 152. After conviction, they moved to arrest the judgment at sentencing because they "had already been found guilty of stabbing" and had "been sentenced to undergo confinement in the penitentiary house, and because no law of the land allows a man convicted, to be sentenced to undergo punishment at a far distant day . . . ." *Ibid.* The district court adjourned the question to the general court. That court then held that the defendants could be confined "upon the five convictions last in the record in the said case mentioned, although they have already been adjudged to undergo such imprisonment upon the first conviction therein mentioned . . . ; and each imprisonment ought to commence from and after the expiration of the imprisonment or imprisonments which may have been adjudged against them before the rendition of such judgments respectively." *Id.*, at 154-155.

A Connecticut decision acknowledged that the same practice was well established by 1811. See *State* v. *Smith*, 5 Day 175, 178-179 (Conn. 1811). Smith was convicted for using a counterfeit bank note when he knew the note was counterfeit. *Id.*, at 176. That same court term, Smith was indicted for using another similar counterfeit note. *Id.*, at 178. He was sentenced by the trial court to three years in prison for each offense, and "the second confinement should commence when the first term should expire." *Ibid.* Smith challenged the terms of his imprisonment as "novel, without precedent, and cruel and illegal." The court rejected the argument. "The postponement, was, therefore, necessary, to prevent the previous conviction

from operating as an exemption from punishment, for a subsequent offense. No injustice is done to the prisoner; and this proceeding is neither new, nor without precedent; *such has been the usage of our courts, for many years past, in this state.*" *Ibid.* (emphasis added). Conspicuously absent from all these cases is any mention of any role for the jury beyond convicting of the underlying offenses.

Discretion to impose multiple convictions for multiple crimes is not a new concept; it is one that has endured in England and the United States for centuries. In 1900, this Court recognized that multiple sentences can be given for multiple offenses, even when the offenses have all been charged in a single indictment. See *In re De Bara*, 179 U. S. 316, 322 (1900). De Bara had been convicted of multiple mail frauds. *Id.*, at 316, 320. He was sentenced to three years confinement in a federal prison, when the maximum sentence he could have received for one offense under the statute was 18 months. *Id.*, at 317. This Court reasoned that although De Bara had been tried under one indictment, he had been found guilty of multiple offenses. *Id.*, at 320. The Court first dispatched an argument based on the procedural peculiarities of the statute in question. See *id.*, at 321. Then it addressed sentencing discretion more generally.

> "To [the trial court] is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offence. It may, though it is not required, to do more upon three offences, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of the defendant . . . ." *Id.*, at 322.

These cases illustrate that in cases of multiple convictions, it was the role of the trial judge to choose

the timing of the second and subsequent sentences. If the sentencing court believed that the offenses of the defendant warranted multiple punishments, it was within the discretion of the judge to structure the sentence so that the sentence for one offense began when the sentence for the first offense terminated. The purpose of the rule of *Apprendi*, *Blakely*, and *Booker* is to preserve the "ancient guarantee" of the jury trial "in a meaningful way" in the face of new circumstances, see *Booker*, 543 U. S., at 237, not to erode the traditional sentencing role of the judge. Traditionally, the sentencing role of the judge has been to exercise his discretion and impose consecutive sentences, instead of concurrent sentences, when he believed the defendant's behavior warranted such punishment.

C. Apprendi.

This Court's *Apprendi* decision reflected the tenets of common law that the " 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.' " See *Blakely*, 542 U. S., at 301-302 (quoting 4 W. Blackstone, Commentaries 343 (1st ed. 1769)). This was the sole purpose of the jury under the common law. The jury had the power to affirm or deny the state's assertions of the defendant's guilt. It did not have the power to order sentences to run concurrently or consecutively. Traditionally, the jury did not concern itself with the punishment that flowed from its determination of guilt or innocence. The jury's function was to determine if the defendant had committed a crime in a system where "a 'crime' or an 'offense' is simply conduct that is forbidden by law and to which certain consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process." See H. Packer, The Limits of Criminal

Sanction 18 (1968). In cases of multiple convictions, the judge remained free to impose consecutive sentences.

The *Apprendi* decision prohibited judges from imposing a sentence for a single crime only when the jury had not found all elements of that crime. *Apprendi*, 530 U. S., at 494. *Apprendi* concerned itself only with the manner in which elements of an offense were found and what should be considered an element for the purpose of the Fifth and Sixth Amendments. Recognition of the judicial power to impose consecutive sentences does not result in "judicial impingement upon the traditional role of the jury." Cf. *Blakely*, 542 U. S., at 309. Nothing here violates the Sixth Amendment right to a jury trial, and to hold any differently would needlessly infringe the authority of the people of the state, through the democratic process, to structure the judicial function of sentencing as they see fit.

III. The state should not be penalized for adding structure to a discretionary sentencing decision.

"[T]he Constitution ought not to be interpreted to strike down all aspects of sentencing systems that grant judicial discretion with some legislative direction and control." *Cunningham* v. *California*, 549 U. S. 270, 127 S. Ct. 856, 872 (2007) (Kennedy, J., dissenting). As described in Part II, *supra*, judges traditionally had complete discretion to make sentences consecutive, subject only to the prohibition against multiple punishment for the same offense. See 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 26.3(f), pp. 730-731 (3d ed. 2007). "Without limits, this freedom could undercut legislative efforts to regulate sentence length, creating the possibility of grossly disparate total

terms of incarceration for similarly situated offenders. So it is not surprising that legislatures have taken additional steps to regulate the imposition of consecutive terms." *Id.*, at 731.

The question before the Court in the present case is whether to create another "no good deed goes unpunished" rule, imposing additional constitutional burdens on the State of Oregon because it chose to limit the traditionally unlimited power of consecutive sentencing to particular factual situations. Oregon Revised Statutes § 137.123 provides:

> "(1) A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences.
>
> "(2) If a defendant is simultaneously sentenced for criminal offenses that do not arise from the same continuous and uninterrupted course of conduct, or if the defendant previously was sentenced by any other court within the United States to a sentence which the defendant has not yet completed, the court may impose a sentence concurrent with or consecutive to the other sentence or sentences.
>
> "(3) When a defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime, the court shall provide that the sentence for the new crime be consecutive to the sentence for the previous crime.

"(4) When a defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, the sentences imposed for each resulting conviction shall be concurrent unless the court complies with the procedures set forth in subsection (5) of this section.

"(5) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the court finds:

"(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or

"(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct."

In comparison to the traditional rule, this statute is very generous to the defendant. The statute establishes concurrent sentencing as the rule with consecutive sentencing as the exception, and factual findings are required to invoke the exception. The state could avoid all *Apprendi* problems by making the opposite presumption, and some have. See LaFave, *supra*, at 732.

There is "considerable irony" in holding that a state violates the defendant's constitutional rights by requir-

ing a factual finding that it could dispense with altogether. See *Cunningham*, 127 S. Ct., at 872 (Kennedy, J., dissenting). California did, in fact, react to *Cunningham* by repealing the fact-finding requirement at issue in that case with a bill that flew through the Legislature in a little over two months. See 2007 Cal. Codes Adv. Leg. Serv., ch. 3; see also *People* v. *Black*, 41 Cal. 4th 799, 808, n. 2, 161 P. 3d 1130, 1135, n. 2 (2007). In the single-offense cases, this ironic result was deemed necessary because of the slippery-slope problem. There was no objective place to draw the line between sentencing systems that merely structured a decision that had always resided with the judge and those that encroached on the traditional function of the jury by effectively authorizing the judge to find the degree of offense. See *Blakely* v. *Washington*, 542 U. S. 296, 306-308 (2004).

In the present case, the slope is not slippery. Consecutive sentencing differs from degree of offense qualitatively, not just quantitatively. Legislative structuring of consecutive sentencing cannot impinge on the function of the jury as it was understood at the time the Sixth Amendment was ratified because the jury had no role whatever in that decision at that time. In this case, the value of drawing a bright line, cf. *id.*, at 308, weighs on the other side of the scale. The rule of *Apprendi* and its progeny should simply be declared entirely inapplicable to the choice of consecutive or concurrent sentences for multiple offenses.

CONCLUSION

The decision of the Supreme Court of Oregon should be reversed.

June, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF OREGON,
Petitioner,

v.

THOMAS EUGENE ICE,
Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF OF INDIANA, ALABAMA, ARIZONA, COLORADO, FLORIDA, HAWAII, KANSAS, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSOURI, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

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INTEREST OF AMICI CURIAE

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The question here is whether this rule extends to factual findings that are necessary to the imposition of consecutive sentences in some states. As the primary administrators of criminal justice in the United States, the amici States have a substantial interest in their ability to place limits on judicial sentencing discretion. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, ... and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.")

The implications of *Apprendi* and *Blakely v. Washington*, 542 U.S. 296 (2004), on the criminal justice systems of many states has been profound. Any extensions or alterations of the *Apprendi*/*Blakely* rule necessarily impact considerable state interests. Imposing consecutive sentences has long been a tool used by various states to ensure appropriate punishments for crimes. The rule of the Oregon Supreme Court erroneously extends the Sixth Amendment into this area and is based on a fundamental misunderstanding of *Apprendi* and its progeny.

Regardless of the direct effect that this case may have on any individual state's consecutive sentencing scheme, the amici States all share the broader interest of insuring continued flexibility for their respective legislatures and judiciaries to adjust sentencing procedures to best realize their states' criminal justice policies.

SUMMARY OF THE ARGUMENT

This is a case about limiting a constitutional rule to its original rationale rather than preferring alternative purposes that justify extending it. More specifically, it is about recognizing that *Apprendi* and *Blakely* have limits and do not impose a requirement that *all* facts bearing on sentencing must be found by a jury.

The Court has tightly bound the Sixth Amendment's jury trial right to its common law origins and limited the reach of that right to the historically indispensable components of a fair trial. Indeed, the *Apprendi* and *Blakely* rule is wholly based on the historical understanding of a jury's proper role. But there is no history of requiring jury involvement in consecutive sentencing decisions.

The court below ignored *Apprendi*'s historical justification and expanded its reach to any factual assessment that affects the total "quantum of punishment" that a defendant faces. That constitutional interpretation is not only unprecedented, but also inappropriately restricts the authority of States to define and administer their criminal laws and precludes meaningful experimentation with sentencing reform. Many

states have adopted procedures that limit traditionally unfettered judicial discretion to impose consecutive sentences by restricting such sentences to particular situations. There is no historical impediment to allowing judges to find those facts, even though States are not free to restrict a defendant's right to a jury trial on the elements of an offense.

Moreover, *Apprendi* can be extended to factfinding for consecutive sentencing decisions only by employing a rule—*i.e.*, whether the decision affects the total "quantum of punishment" that a defendant faces—that extends to *any* decision affecting the type and amount of punishment. Thus, *Apprendi* would govern decisions whether to suspend sentences, to impose alternatives to incarceration alternatives, to impose probation, and to require restitution, to name a few. That rule would also call into question the Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), which upheld federal mandatory minimum sentences based on sentencing-phase factfinding from an *Apprendi* challenge.

Finally, the "quantum of punishment" rule divined by the court below also creates practical problems. Prosecutors, defense counsel and courts must construct ways to plead and prove facts relevant to consecutive (and other) sentencing determinations that often are unknown prior to trial and would be prejudicial to a defendant's interest in an unbiased jury and a fair trial.

Absent a compelling historical basis for the Oregon Supreme Court's "quantum of punishment" rule, the Court should decline the invitation to

rewrite *Apprendi* to encompass facts that are not properly considered elements of an offense.

ARGUMENT

I. Absent some historical rationale, the Sixth Amendment should not limit a legislature's authority to cabin judicial sentencing discretion by requiring judicial fact-finding where appropriate

1. The scope of the Sixth Amendment's jury trial right consistently has been tied to its history. *Williams v. Florida*, 399 U.S. 78, 98 (1970). "[T]o turn[ ] to other than purely historical considerations to determine which features of the jury system, as it existed at common law, were preserved in the Constitution" would be to "do violence" to the Amendment. *Id.* Hence, the Court has long held that the scope of the Sixth Amendment's jury trial right is no broader that the right that existed at common law. *Callan v. Wilson*, 127 U.S. 540, 549 (1888). *See also* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial By Jury*, 39 Harv. L. Rev. 917, 970-71 (1926). This is not to say that the Sixth Amendment incorporates every detail of common law jury trials; rather, it protects only the "indispensable components" of the common-law jury trial. *Williams*, 399 U.S. at 99-100.

The English and American legal traditions, however, have not provided the jury with a role in making decisions about aggregate sentencing, as Petitioner has exhaustively recounted. *Br. of Petitioner* at 34-51. This history establishes that

consecutive sentencing has always been considered an appropriate decision for the judiciary, so it undermines any rationale for expanding the *Apprendi* rule to factual predicates for consecutive sentences. *Jones v. United States*, 526 U.S. 227, 244 (1999).

The decision below rests upon the novel understanding that jury trial rights turn upon a change in the "quantum of punishment" (Pet. App. 28)—a notion foreign to the Court's *Apprendi* and *Blakely* holdings. Those cases require jury trials only where a fact increases the statutory maximum punishment for a particular criminal offense. *Apprendi*, 530 U.S. at 490; *Blakely*, 542 U.S. at 301. This rule vindicates the Sixth Amendment guarantee that a jury, not a judge, is available to adjudicate all facts traditionally considered elements of criminal offenses. *Br. of Petitioner* at 20-25. The Court should decline any invitation to switch now to a broader "quantum of punishment" theory that lacks any foundation in text or history and that will excessively bind state procedures and preclude experimentation with sentencing reform that respects historical constitutional values.

2. The Court has never questioned any aspect of judicial authority to impose consecutive sentences under the Constitution, despite a long history of consecutive sentences. Both legislative and judicial bodies, however, have questioned the wisdom of unguided discretion in sentencing in light of studies showing disparities in sentences from locality to locality, between judges in the same locality, and even by the same judge. 6 Wayne R. LaFave, Jerold H. Israel, Nancy J. King, & Orin S. Kerr, CRIMINAL

PROCEDURE § 26.3(b) (3d ed. 2007). Consequently, modern sentencing reform in many jurisdictions has sought to curb the historically broad discretion of judges to impose consecutive sentences for multiple offenses. Some States now require judges to give facts supporting their decisions, *see Smylie v. State*, 823 N.E.2d 679, 686 (Ind.), *cert. denied*, 546 U.S. 976 (2005), and others now prohibit consecutive sentences unless judges find particular enumerated facts. *See* Pet. App. 10-12. In either situation, judges, as the sentencing authority, must make some factual findings before exercising their discretion.

These reform efforts have never targeted defendants' jury trial rights. "[P]ermitting a judge to make any factual findings related to the choice between concurrent or consecutive sentences does not create an opportunity for legislatures to eliminate the right to a jury trial on elements of the offenses." *People v. Black*, 113 P.3d 534, 549 (Cal. 2005), *cert. granted and judgment vacated by Black v. California*, 549 U.S. __ (2007), *reaff'd in relevant part by People v. Black*, 161 P.3d 1130 (Cal. 2007), *cert. denied*, 552 U.S. __ (2008). Rather, these developments mark legislative restrictions on inherent judicial authority in order to ensure proportionality between sentences and offenses as well as sentencing parity among offenders. *Blakely*, 542 U.S. at 308. Such restrictions are a legitimate exercise of legislative judgment and reflect valid policy considerations. *Id.*

3. States authorize aggregate sentencing in a number of ways. Amici provide a few examples below.

Indiana

In Indiana, the judiciary has been the driving force in sentencing reform, at least insofar as making policy choices to control sentencing disparities. The Indiana legislature has entrusted the aggregate sentencing decision to the trial judge's sole discretion, Ind. Code § 35-50-1-2(c), but the Indiana Supreme Court has added the requirement that judges find aggravating circumstances before imposing consecutive sentences. *Smylie*, 823 N.E.2d at 686 n.8 (citing *Shippen v. State*, 477 N.E.2d 903, 905 (Ind. 1985), and *Mott v. State*, 402 N.E.2d 986, 988 (Ind. 1980)). A statute provides a non-exhaustive list of aggravating circumstances that can be used in any sentencing decision, but *any* fact, even if not enumerated by statute, may serve as an aggravating circumstance. Ind. Code § 35-38-1-7.1(d); *Evans v. State*, 497 N.E.2d 919, 923-24 (Ind. 1986).

This judicially made requirement ensures that lengthy sentences are not arbitrary or capricious and facilitates appellate review.[1] *Henderson v. State*, 489 N.E.2d 68, 72 (Ind. 1986). The freedom of Indiana's judiciary to fashion appropriate rules to avoid sentencing anomalies enabled by unlimited judicial discretion has proven to be essential for meaningful sentencing policy reform.

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[1] Indiana provides for robust review of sentences on direct appeal, where courts may revise sentences for mere "inappropriateness." *Serino v. State*, 798 N.E.2d 852, 856-57 (Ind. 2003).

Tennessee

In Tennessee, the judiciary took initial steps to promote sentencing reform, and the legislature followed its lead. The Tennessee legislature permits judges to impose consecutive sentences only if they find, by a preponderance of the evidence, one of seven factual circumstances to exist, such as where the defendant is:

- a "professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;"

- a "dangerous mentally abnormal person" whose "criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;" or

- a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high."

Tenn. Code Ann. § 40-35-115.

The purpose of this statute is to insure that consecutive sentences are not routinely imposed and that aggregate sentences are "reasonably related to the severity of the offenses involved." *Id.*, comments following. It codifies the policy of the Tennessee Supreme Court, which in turn was based on the American Bar Association Project on Standards for Criminal Justice and the Model Penal Code. *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976) (citing

American Bar Association Project on Standards for Criminal Justice, *Sentencing Alternatives and Procedures*, § 3.4(b)(IV) (1968), and Model Penal Code § 7.03 (Proposed Official Draft 1962)); *State v. Taylor*, 739 S.W.2d 227, 228 (Tenn. 1987) (quoting *Gray*, 538 S.W.2d at 393).

Ohio

In Ohio, sentencing reform has been the product of legislative action from the beginning. Prior to 1996, Ohio law provided for classic indeterminate sentencing: judges announced the minimum and maximum terms of a sentence and a parole board later determined the actual release date. *State v. Foster*, 845 N.E.2d 470, 484 (Ohio), *cert. denied*, 549 U.S. __ (2006). In 1996 the legislature enacted a "truth in sentencing" law that permits consecutive sentences only where the trial court finds that "consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public" *and* one of three additional circumstances: (1) "the offender was already under control of the court due to an earlier conviction"; (2) "at least two of the offenses were committed as part of a course of conduct and the harm was so great or unusual that no single prison term adequately reflects the seriousness of the conduct"; or (3) "[t]he offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public." Ohio Rev. Code § 2929.14(E)(4); *Foster*, 845 N.E.2d at 491.

In *Foster*, however, the Ohio Supreme Court, like the Oregon Supreme Court here, interpreted *Apprendi* and *Blakely* to require a right to a jury trial for the factual findings necessary to justify consecutive sentences. *Id.* at 494.

* * *

There may be as many different approaches to consecutive sentencing as there are states and territories. *See* 6 LaFave, *et al.*, *supra at* _, § 26.3(f) at 732-35 (compiling cases discussing various approaches to aggregate sentencing among the various States). But there is a common need for flexibility to fashion sentencing laws to satisfy parochial policy choices. *See* Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37, 38-39 (2006) (arguing for greater flexibility and nuance in sentencing jurisprudence because states, "which sentence most defendants, serve as laboratories of democratic experimentation and need room to try novel sentencing arrangements"). And while *Blakely* recognized the legitimacy of real sentencing reform efforts among the states, 542 U.S. at 308, expanding *Blakely*'s reach here would render that recognition meaningless.

II. Expanding *Apprendi* to factfinding in consecutive sentencing decisions has potentially far-reaching consequences and would present many practical difficulties

1. In the Oregon Supreme Court's view, the *Apprendi* rule is triggered by any fact that increases the "quantum of punishment" broadly understood.

Pet. App. 28. The scope of such a rule, however, logically covers all sorts of sentencing determinations that, like consecutive sentencing decisions, have never been left to juries and have no connection to the Sixth Amendment concerns that *Apprendi* targets.

For example, States allow courts to suspend all or part of a sentence and impose probation.[2] Also, in the interests of sentencing reform and fiscal responsibility, States have instituted alternatives to total incarceration, such as community corrections programs, work release programs, and home detention programs.[3] If, as the court below has asserted, it is "self-evident" that consecutive sentences are "greater punishment" than concurrent sentences, *see* Pet. App. 28 n.5, it is hard to see how a fully executed sentence in a prison is not "greater punishment" than a sentence served on home detention or probation. Trial courts necessarily decide whether to utilize these sentencing alternatives based on facts about the commission of the crime and the character of the defendant that are brought to their attention in the sentencing process. *See also, e.g.*, Cal. Penal Code § 1203(b) (requiring that, before a court orders suspension of a sentence to probation, it shall order a probation officer to investigate and report to the court about

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[2] *See, e.g.*, Alaska Stat. § 12.55.015; Cal. Penal Code § 1203; Colo. Rev. Stat. § 18-1.3-401(11); Ind. Code § 35-50-2-2; Me. Rev. Stat. Ann. tit. 17, § 1152; N.H. Rev. Stat. § 651:20; N.J. Stat. Ann. § 2C:43-2; Tenn. Code Ann. §§ 40-35-103, -303; Tex. Code Crim. Proc. art. 42.12.

[3] *See, e.g.*, Fla. Stat. § 948.01(3); Ind. Code § 35-38-2.6; N.H. Rev. Stat. § 651:19.

the circumstances surrounding the crime and the prior history and record of the offender).

Similar potential problems arise with respect to other aspects of a sentence that may be imposed in addition to an executed term in prison. States allow courts to impose fines and fees and to order payment of restitution as parts of criminal sentences.[4] These terms also increase the quantum of punishment: a person who is both incarcerated and ordered to pay a fine or restitution is exposed to greater punishment than a person who is only incarcerated. Decisions to impose these additional terms of sentence are often based on the court's assessment of specific facts about the nature of the offense or the character of the offender. Restitution, especially, often requires specific factual determinations that lie outside the jury's verdict, such as the amount of the damages and whether those damages are of a type for which restitution may be ordered. *See, e.g.*, Ind. Code § 35-50-5-3(a).

Those decisions bear no relation to the concern that juries should determine all facts that effectively constitute elements of the offense. Should the Court expand *Apprendi* to cover consecutive sentencing decisions, it is hard to see what logical basis could keep it from extending to all factual assessments involved in the sentencing decision.

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[4] *See, e.g.*, Alaska Stat. §§ 12.55.035, 12.55.045; Cal. Penal Code § 1202.4; Fla. Stat. §§ 775.083, 775.084; Ind. Code §§ 35-50-2-3 through 7, 35-50-5-3; Me. Rev. Stat. Ann. tit. 17, § 1152; N.H. Rev. Stat. §§ 651:2, 651:63; N.J. Stat. Ann. §§ 2C:43-2, 2C:43-3; Tex. Penal Code §§ 12.32, 12.33, 12.34, 12.35.

2. Moreover, by expanding *Apprendi* beyond its historical rationale, the Oregon Supreme Court has called into question *Harris v. United States* and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Those cases held that mandatory minimum sentencing determinations based on predicate facts do not implicate the Sixth Amendment jury trial right. *Harris*, 536 U.S. at 557-68 (plurality opinion); *McMillan*, 477 U.S. at 84-91. This is because the facts that trigger mandatory *minimum* sentences do not increase the statutory maximum sentences to which defendants are subjected. *Harris*, 536 U.S. at 557, 566-67; *McMillan*, 477 U.S. at 87-89. Again, *Apprendi* says that the Sixth Amendment jury trial right applies only to facts that increase the maximum otherwise allowable sentence for a given offense—facts that are, effectively, elements of the offense.

Once the rule is detached from that element/offense-specific focus, however, and tracks instead the quantum of punishment being inflicted, there is no reason to distinguish between minimums and maximums. Mandatory minimums do not increase the potential maximum sentence for an offense, but they do increase the quantum of punishment to which an offender is subject. In the language of the Oregon Supreme Court, a defendant is exposed to greater punishment if he is required to serve a mandatory minimum sentence than he is if his entire sentence is suspended. In other words, the reasoning below alters *Apprendi*'s focus away from the elements of a specific offense but also erodes its limitation to only those facts implicating the "maximum" sentence.

A focus on the quantum of punishment is incompatible with a limitation based on the maximum sentence; many aspects of a sentence can affect the degree to which punishment is inflicted without altering the maximum sentence available. Once the underlying conceptual question is changed from "does this fact increase the maximum sentence available for this discrete offense" to "does this fact increase the amount of punishment to which this offender has been subjected," the inquiry expands to include all sorts of sentencing decisions that the *Apprendi* Court never contemplated it was affecting.

3. Such an expansion of the *Apprendi* rule will also create practical difficulties for the courts, prosecutors, and defense attorneys charged with executing that rule. Facts that fall within *Apprendi*'s reach do not just implicate the right to a jury trial—they also implicate pleading and notice rights. *Apprendi*, 530 U.S. at 499-500 (Thomas, J., concurring).

But some facts that bear on consecutive sentencing decisions will not be known or discovered prior to trial. *See Blakely*, 542 U.S. at 319 (O'Connor, J., dissenting) (recognizing this fact). The more complex the case and the greater the number of charges, the more difficult it will be to ascertain ahead of time all facts potentially relevant to possible consecutive sentences—facts that must be added to an already-complex indictment or information. It is not an overstatement to observe that in such cases, providing adequate notice of all facts that could effect the defendant's sentence will be nearly impossible.

Other facts that bear on consecutive sentencing decisions, such as prior bad acts or criminal history not reduced to convictions, would be irrelevant and highly prejudicial if admitted during the guilt phase of a trial. *See id.* at 318-19. Under Oregon's own system, a defendant's "willingness to commit more than one criminal act," *see* Or. Rev. Stat. § 137.123(5)(a), might well be established by evidence of the defendant's prior antisocial behavior—evidence that would be highly prejudicial during the guilt phase of the trial. Thus, to avoid that prejudice, States will be forced to resort to bifurcated or even trifurcated trials on sentencing facts if they want defendants to be eligible to serve a discrete sentence for each criminal offense committed. When such a result is not required by the defining history of Sixth Amendment, it should not be artificially imposed upon the States in name of *Apprendi*.

* * *

The Court should heed its admonition in *Patterson* that the Sixth Amendment should not be construed beyond its historical bounds to the detriment of the state's responsibility as the primary administrators of criminal justice in our federal system. *Patterson*, 432 U.S. at 201-02. Rather, it should continue to limit application of the Sixth Amendment's right to jury trial to the "indispensable components" of a fair trial. *Williams*, 399 U.S. at 99-100.

CONCLUSION

The judgment of the Oregon Supreme Court should be reversed.

Respectfully submitted.

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Dated: June 9, 2008

AMICUS CURIAE BRIEF

101

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IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakeley* v. *Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by that defendant.

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation of more than 10,000 attorneys and 28,000 affiliate members in all 50 States. The American Bar Association ("ABA") recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense practice. NACDL works tirelessly to ensure the proper administration of justice, an objective that this case directly impacts in light of its overarching importance to ensuring that criminal sentences are imposed in accordance with the Constitution, and are based on consideration of the defendant as an individual presenting a "unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Gall* v. *United States*, 128 S. Ct. 586, 598 (2007).

The ineluctable consequences of post-verdict judicial factfinding are that the sentence increases and that the judge can no longer exercise his sense of justice and mercy when sentencing an individual defendant. NACDL's membership has long relied

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties have been given timely notice of the filing of this brief, and letters of consent have been filed with the Clerk.

upon the jury's factfinding role as one of the vital means of ensuring the balance between these principles of justice and mercy. As such, NACDL is uniquely qualified to offer assistance to this Court in this matter.

SUMMARY OF ARGUMENT

This case presents a straight-forward question under this Court's decisions in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and related cases. An Oregon jury convicted Respondent of multiple crimes. At sentencing, the judge made additional findings of fact by a preponderance of the evidence about the offenses and what they reflected about the defendant's state of mind. *See State* v. *Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008); Or. Rev. Stat. Ann. § 137.123(2), (5). The judge then imposed consecutive sentences for certain of Respondent's convictions. Does the fact that the judge considered facts, other than a prior conviction, exposing Respondent to a sentence beyond the statutory maximum violate the Sixth Amendment? That is the question before this Court.

A criminal defendant in Oregon is entitled to concurrent sentences *unless* the judge makes certain factual findings. Or. Rev. Stat. Ann. § 137.123. The jury's verdict alone plainly does not sanction consecutive sentencing. Oregon law authorizes a court to impose consecutive sentences after judicial factfinding, regardless of whether this increases a term of incarceration beyond the maximum authorized for any single offense for which a defendant was convicted. This violates the Sixth Amendment, as the court below found.

Moreover, Oregon's sentencing statute reflects a dramatic departure from historical practices, one

taken by only a few other states. At common law, judges generally were vested with full discretion to order that multiple sentences be served consecutively or concurrently. As a result, all criminal offenses incorporated the possibility of consecutive sentencing as part of the potential maximum punishment, and so consecutive sentencing was authorized by the jury's verdict alone. This practice comports with the Sixth Amendment and this Court's *Apprendi* line of cases. Today, nearly every state employs a sentencing practice grounded on this historical practice of judicial discretion. Therefore, affirming the ruling below will affect at most the handful of states that have dramatically departed from this practice. Finally, many states have revised their sentencing schemes in ways that conform to the Constitution, and so affirming the ruling below will not prevent states from engaging in appropriate sentencing reform.

ARGUMENT

I. THE OREGON SUPREME COURT'S DECISION ACCORDS WITH THIS COURT'S DECISIONS.

This Court's case law states that any fact that exposes the defendant to a punishment beyond the prescribed statutory maximum must be proved beyond a reasonable doubt to the jury. Under Oregon's consecutive sentencing statute, the court may impose a consecutive sentence only if it finds certain facts about the offenses and what they reflect about the defendant's state of mind. *See* Or. Rev. Stat. Ann. § 137.123(2), (5); *State* v. *Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008). The Oregon Supreme Court overturned Respondent's sentence on the ground that Oregon's consecutive sentence statute violated the Sixth Amendment and

this Court's decisions in *Apprendi* and *Blakely* v. *Washington*, 542 U.S. 296 (2004). This Court should affirm the judgment below.

a. The "rule" articulated in *Apprendi* is that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" 542 U.S. at 301 (quoting *Apprendi*, 530 U.S. at 490). This Court clarified in *Blakely* that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303-04 (emphasis in original).

The Oregon statute at issue here plainly violates this rule. Sentencing regimes such as Oregon's impermissibly encroach upon the jury's fact-finding function, as the Oregon Supreme Court rightly recognized. Under Oregon's sentencing statute, "[a] sentence *shall* be deemed to be a concurrent term *unless* the judgment expressly provides for consecutive sentences" and is accompanied by specific statutorily-required findings of fact. Or. Rev. Stat. Ann. § 137.123(1) (emphasis added). Because the court must find that the defendant's actions indicated a "willingness to commit more than one criminal offense," or "caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim . . . than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct," *id.* § 137.123(5)(a)-(b), imposing consecutive sentences is "contingent on the finding" of an aggravating factor. *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002).

The existence of such aggravating factors is precisely the type of finding that a jury must make beyond a reasonable doubt under *Apprendi*. Oregon's

statute, however, requires a judge to make such findings under a preponderance of the evidence standard, even though these facts expose defendants to significantly increased punishment.[2] Or. Rev. Stat. Ann. § 137.123. The Oregon Supreme Court correctly determined that a consecutive sentence "necessarily expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict," *Ice*, 170 P.3d at 1058 (quoting *Apprendi*, 530 U.S. at 494), "and thereby violates the principles discussed in *Apprendi* and *Blakely*." *Id.*

A finding of "willingness to commit more than one criminal offense," Or. Rev. Stat. Ann. §137.123(5)(a), reflects the defendant's intent or state of mind, which this Court recognized in *Apprendi* as "perhaps as close as one might hope to come to a core criminal offense 'element.'" 530 U.S. at 493. The fact that Oregon's system strips defendants of basic constitutional protections is particularly troubling where, as here, the required findings involve the defendant's *mens rea*.

In response to this reading, the State reverts to a re-labeling defense, characterizing the Oregon sentencing statutes as setting forth sentencing "factors" rather than "elements" of a substantive crime.[3]

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[2] In Respondent's case, the consecutive sentences imposed by the trial judge more than tripled his sentence, from 90 months (the longest sentence, imposed on count 5) to more than twenty years. *See* App. 26, 38-45.

[3] The Petitioner and *amici* Sentencing Law Scholars also attempt to distinguish the elements of an offense and maximum sentencing from aggregate maximum sentencing. *See* Pet'r's. Br. This argument fails. There is a qualitative difference between an aggregate sentence for multiple offenses and the maximum sentence for a single offense. The jury's verdict qualifies a defendant for the aggregate *total*. Thus, the facts as

Pet'r's. Br. at 20-25, 28. As the Oregon Supreme Court recognized, this distinction cannot bear scrutiny. *Ice*, 170 P.3d at 1056; *see also Blakely*, 542 U.S. at 306; 6 Wayne R. LaFave et al., *Criminal Procedure* § 26.4(i) (3d ed. 2007). For illustration, compare *Ice* with *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). *Almendarez-Torres* held that recidivism, "as typical a sentencing factor as one might imagine," is not an element of the crime of unlawful reentry after deportation under 8 U.S.C. § 1326.[4] 523 U.S. at 230. Furthermore, defendants rarely contest recidivism and doing so might create unfair prejudice with the jury. But in finding a defendant guilty of more than one offense, the jury will invariably determine the defendant's willingness to commit those offenses, which the defendant frequently contests.

Instead, the relevant inquiry is, as the Oregon Supreme Court correctly stated, "one not of form, but of effect," *Apprendi*, 530 U.S. at 494 (footnote omitted); namely, does "the required finding expose the defendant to a greater punishment than that authorized by

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found only serve to set the punishment within that total. But such a system cannot be distinguished from *United States* v. *Booker*, 543 U.S. 220 (2005)—as the federal Sentencing Guidelines also account for multiple crimes. *U.S. Sentencing Guidelines Manual* §§ 3D1.1-3D1.5, 5G1.2 (2007) ("U.S.S.G."); *see also Blakely*, 542 U.S. at 305 & n.9 ("Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid."). Here, as in *Booker*, the problem is both the mandatory nature of the factfinding and the type and kind of the facts being found. *Apprendi*, 530 U.S. at 490. The Oregon court correctly read this Court's precedent and concluded that "[i]t would be wrong for us to engage in an adamantine refusal to get the message." *Ice*, 170 P.3d at 1059.

[4] A prior conviction, of course, "must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones* v. *United States*, 526 U.S. 227, 249 (1999).

the jury's guilty verdict"? *Id.* Here, the answer is unequivocally "yes." The court's finding of the statutory aggravating factors exposed Respondent to a sentence greater than the statutory maximum sentence – in this case, concurrent sentences – that he would have faced without such findings. As the Oregon Supreme Court held, the consecutive sentencing regime violated Respondent's Sixth Amendment rights.

c. Oregon can remedy its unconstitutional statute easily. As several states have done already, Oregon could sever the offending mandatory statutory provision and make its sentencing regime purely advisory, thus resorting to the judicial discretion practiced historically in this area of the law. Alternatively, the State could amend the statute to require that aggravating factors be tried to the jury. A third possibility may be to require that *all* sentences (or none) be served concurrently, or that particular offenses always (or never) are to be served concurrently. Any of these approaches would remedy the Sixth Amendment violation of the statute as written. *See, e.g.*, *Kimbrough* v. *United States*, 128 S. Ct. 558, 577 (2007) (Thomas, J., dissenting) (severing "unconstitutional applications of statutory provisions . . . would have achieved compliance with the Sixth Amendment while doing the least amount of violence to the . . . sentencing regime" the legislature enacted).

This Court should affirm the decision of the Oregon Supreme Court. That court correctly held that Oregon's consecutive sentencing statute violates the Sixth Amendment as construed in this Court's decisions in *Apprendi* and related decisions. Affirming the State court will have minimal impact on the State but will bring the State into compliance with *Blakely*.

II. AFFIRMING THE OREGON SUPREME COURT WILL AFFECT ONLY A HANDFUL OF STATES, AND WILL NOT UNDERMINE SENTENCING REFORM EFFORTS.

Contrary to the implications of the *amici* States, *Amici* States Br. at 4-15, affirming the court below will affect the statutes only of a handful of states and will not restrict states' latitude to engage in substantive sentencing reform that conforms to the Constitution. Only a handful of states substantially deviate from the longstanding historical practice of vesting judges with wide discretion to determine whether multiple criminal sentences are to be served consecutively. As the historical practice conforms to the Sixth Amendment's requirement that maximum criminal penalties be authorized by jury verdicts, affirming the Oregon Supreme Court's Sixth Amendment analysis would affect the statutes only of the handful of States that *require* specific judicial fact-finding before ordering consecutive sentencing.

a. *Amicus* substantially adopts Petitioner's description of historical sentencing practices at common law. Pet'r's. Br. at 29-52. Put simply, petit juries long have determined guilt for offenses, and sentences generally were specified at law for each such offense at common law. *Id.* at 40-42. Judges merely ordered the appropriate, defined sentence, and determined, where appropriate, whether the sentences for multiple offenses should be served concurrently or consecutively. *Id.* Thus, judges in most common law jurisdictions possessed unfettered authority to order that multiple sentences be served consecutively or concurrently. *Id.* at 42-51. Looked at another way, criminal offenses historically incorporated consecutive sentencing as part of their maximum potential sentence.

Most of the States (and the federal government[5]) have not substantially deviated from historical practices regarding consecutive and concurrent sentences. In forty-seven states, courts are authorized to order that multiple criminal sentences be served consecutively (except where consecutive sentencing is expressly barred) *without* finding additional facts not found by a jury.

A large group of forty-four states generally leave it to the judge's discretion to determine whether multiple criminal sentences should be served consecutively or concurrently. More specifically, judges in thirteen of these states essentially have unfettered discretion to order that sentences be served consecutively or concurrently.[6] The remaining 31 states modify only slightly the historical role of judges in determining the type of sentence to be served. Three states preserve judicial discretion but provide that consecutive sentences are the default choice[7] unless the judge

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[5] U.S.S.G. § 5G1.2 (establishing advisory scheme to determine whether to impose multiple sentences consecutively). *See also* U.C.M.J. arts. 57, 57a (establishing judicial discretion for determining whether to suspend or defer sentences); R.C.M. 1101(c), 1107(d)(3) (establishing judicial discretion for determining whether to impose consecutive sentences in courts-martial); R.M.C. 1101(c), 1107(d)(3) (same for military commissions).

[6] Connecticut (Conn. Gen. Stat. Ann. § 53a-37); Idaho (Idaho Code Ann. § 18-308); Nebraska (Neb. Rev. Stat. § 29-2204); New Mexico (*State* v. *Lopez*, 661 P.2d 890 (N.M. Ct. App. 1983)); Ohio (*State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006)); Oklahoma (Okla. Stat. Ann. tit. 22, § 976); Pennsylvania (42 Pa. Cons. Stat. Ann. § 9721); South Carolina (S.C. Code Ann. § 16-23-490); South Dakota (S.D. Codified Laws § 22-6-6.1); Vermont (13 Vt. Stat. Ann. § 7032); Washington (Wash. Rev. Code Ann. §§ 9.94A.535, 9.94A.589(1)(2)); and Wyoming (Wyo. R. Crim. Proc. 32).

[7] Generally, these "default" choices do not circumscribe judicial discretion, but merely create a presumption where the court

orders the sentences to be served concurrently,[8] and three other states provide concurrent sentencing as the default option.[9] Twenty-two states require consecutive sentencing in certain well-defined circumstances – most commonly where the second or subsequent offense occurred in prison or otherwise was committed while an outstanding sentence remained undischarged – and provide for judicial discretion to issue consecutive sentencing in other circumstances.[10] Two states provide for a "split default" in

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passes on the question of consecutive or concurrent sentencing in silence. *See People* v. *Black*, 161 P.3d 1130, 1145 (Cal. 2007), *cert. denied* (128 S. Ct. 1063 (2008) (in interpreting California law, noting that "California's statute does not establish a presumption in favor of concurrent sentences; its requirement that concurrent sentences be imposed if the court does not specify how the terms must run merely provides for a default in the event the court fails to exercise its discretion.").

[8] Alabama (Ala. Code § 14-4-9); Virginia (Va. Code Ann. § 19.2-308); and West Virginia (W. Va. Code Ann. § 61-11-21).

[9] California (Cal. Penal Code § 669); Georgia (Ga. Code Ann. § 17-10-10); and Minnesota (*State* v. *Murphy*, 545 N.W.2d 909 (Minn. 1996) (en banc) (per curiam)).

[10] Alaska (Alaska Stat. Ann. § 12.55.127) (default concurrent); Arkansas (Ark. Code Ann. § 5-4-403) (default concurrent, and authorizing juries to suggest consecutive sentencing); Arizona (Ariz. Rev. Stat. Ann. § 13-708) (default consecutive); Colorado (Col. Rev. Stat. Ann. § 18-1.2-406); Florida (Fla. Stat. Ann. § 921.16) (default concurrent); Idaho (Idaho Code Ann. § 18-308); Illinois (730 Ill. Comp. Stat. Ann. 5/5-8-4) (mandating consecutive sentencing for certain offenses, and otherwise requiring court to review certain factors before ordering multiple sentences to run consecutively); Kansas (Kan. Stat. Ann. § 21-4608); Kentucky (Ken. Rev. Stat. Ann. § 532.110); Maryland (Md. Rules 4-351; Md. Code Ann., Corr. Servs. § 9-201); Massachusetts (Mass. Gen. Laws Ann. ch. 90, § 24V); Mississippi (Miss. Code Ann. § 99-19-21); Missouri (Mo. Ann. Stat. § 558.026) (default concurrent); Montana (Mont. Code Ann. § 46-18-401) (default consecutive); Nevada (Nev. Rev. Stat. Ann.

sentencing – retaining judicial discretion but providing that consecutive sentencing is the default option if the offenses arise from different transactions or at different times, and that concurrent sentencing is the default when the offenses arise from the same set of facts and circumstances.[11] Finally, one state – Indiana – has amended its sentencing scheme to incorporate "advisory" sentences, which require judges to make certain legislatively-denoted findings as to aggravating and mitigating factors, but authorizing judges to order that sentences be served concurrently or consecutively regardless of their findings. Ind. Code Ann. §§ 35-50-1-2(c), 35-38-1-7.1(d)(1); *Howell v. State*, 859 N.E.2d 677, 681 n.3 (Ind. Ct. App. 2006).

In addition to the forty-four states discussed above, a smaller group of three states have devised statutory schemes restricting judicial discretion to issue consecutive or concurrent sentencing in ways that do not depend on judicial fact-finding. Two states – Michigan and New York – mandate concurrent sentencing in certain well-defined circumstances, but do not base this determination on judicial factfinding.[12] Mean-

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§ 176.035) (default concurrent); New Jersey (N.J. Stat. Ann. § 2C:44-5); North Carolina (N.C. Gen. Stat. Ann. § 15A-1354) (default concurrent); North Dakota (N.D. Cent. Code Ann. § 12.1-32-11 (default concurrent); Rhode Island (R.I. Gen. Laws § 12-19-5); Texas (Tex. Code Crim. Proc. Ann. art. 42.08); Utah (Utah Code Ann. § 76-3-401); and Wisconsin (Wis. Stat. Ann. § 973.15).

[11] Hawai'i (Haw. Rev. Stat. Ann. § 706-668.5); Louisiana (La. Code Crim. Proc. Ann. art. 883).

[12] Michigan (Mich. Comp. Laws Ann. § 768.7b) (mandating concurrent sentencing except where statute expressly provides otherwise); New York (N.Y. Penal Law § 70.25) (default concurrent with mandatory concurrent sentencing in certain circumstances).

while, Delaware restricts judicial discretion by requiring consecutive sentencing in all circumstances.[13]

The historical practice of determining consecutive or concurrent sentencing broadly conforms to the Sixth Amendment. Where judges are vested with the discretion to issue consecutive or concurrent sentences, the possibility of consecutive sentencing is incorporated into every eligible criminal offense, and so consecutive sentencing is authorized by the jury's verdict alone. The fact that many states have expressly required consecutive sentencing for particular offenses does not affect this analysis, for in those circumstances the eligibility *vel non* of consecutive sentencing is expressly incorporated into particular statutes or particular offenses, and is authorized by the jury's verdict alone. *See also* LaFave, *supra*, § 26.4(i) (discussing state sentencing regimes). Therefore the current laws of forty-seven states largely would be unaffected should the Court affirm the Oregon Supreme Court's ruling.

b. By contrast, today there are only three states – Maine and Tennessee,[14] in addition to Oregon – whose sentencing statutes strongly deviate from historical practice by predicating the authority to order consecutive sentencing on judicial factfinding beyond the jury verdict.[15] In each of those states,

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[13] Delaware (Del. Code Ann. § 3901(d)).

[14] In addition to Oregon's Supreme Court, the courts of Ohio and Washington have held unconstitutional sentencing statutes requiring judicial factfinding before consecutive sentences may be ordered. *In re Personal Restraint of VanDelft*, 147 P.3d 573 (Wash. 2006), *cert. denied*, 127 S. Ct. 2876 (2007); *State* v. *Foster*, 845 N.E.2d 470 (Ohio 2006).

[15] Indiana (Ind. Code Ann. §§ 35-38-1-7.1, 35-50-1-1.3); Maine (Me. Rev. Stat. Ann. tit. 17-A, § 1256; *State* v. *Keene*, 927 A.2d

judges *may not* order that multiple sentences be served consecutively *unless* the judge makes certain legislatively-mandated findings of fact regarding the nature of the criminal offense which were *not* found by a jury.

Not surprisingly, the concurrent/consecutive sentencing schemes of these states bear a strong resemblance to the pre-*Booker* mandatory Sentencing Guidelines. For instance, Tennessee law expressly allows a judge to order sentences to run consecutively in most instances only

> if the court finds by a preponderance of the evidence that: (1) The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood; (2) The defendant is an offender whose record of criminal activity is extensive; (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences; (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high; (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's

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398 (Me. 2007)); Tennessee (Tenn. Code Ann. § 40-35-115; *State* v. *Allen*, __ S.W.3d __, 2008 WL 2497001 (Tenn. June 24, 2008)).

> undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims; (6) The defendant is sentenced for an offense committed while on probation; or (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7). Tennessee's Supreme Court recently affirmed the constitutionality of this provision by asserting that *Apprendi* applied only to individual sentencing, and that Tennessee's consecutive sentencing law does not implicate the statutory maximum sentence for any given offense. *State* v. *Allen*, __ S.W.3d __, 2008 WL 2497001, at *17-18 (Tenn. June 24, 2008) (relying on *State* v. *Keene*, 927 A.2d 398, 407-08 (Me. 2007) and the dissenting opinion below, *Ice*, 170 P.3d at 1059, 1062). However, Tennessee's Supreme Court noted that the issue would be decided ultimately by this Court's decision in the present case. *Allen*, ___ S.W.3d ___, 2008 WL 2497001, at *17.

Similarly, Maine's legislature forbids courts to order consecutive sentencing unless, *inter alia*, "the convictions are for offenses based on different conduct or arising from different criminal episodes," and courts may not issue consecutive sentencing "for crimes arising out of the same criminal episode when," *inter alia*, "[i]nconsistent findings of fact are required the establish the commission of the crimes." Me. Rev. Stat. Ann. tit. 17-A, § 1256(2)-(3). Maine's law differs from those of states that have merely established defaults because Maine's scheme prohibits consecutive sentencing without further judicial fact-finding, while the "default" states do not circumscribe judicial discretion to impose consecutive sentencing. *Compare id.*, *with* Haw. Rev. Stat. Ann. § 706-668.5, *and* La. Code Crim. Proc. Ann. art. 883.

Thus, the laws of Maine and Tennessee require courts to engage in judicial factfinding outside of the jury before they are authorized to order consecutive sentencing. Put another way, criminal sentences authorized by jury verdicts in these states do not incorporate consecutive sentencing as part of the statutory maximum penalty because a court may order that multiple sentences be served consecutively only through additional judicial fact-finding. But it is clear that consecutive sentencing could well exceed the statutory maximum penalty for any individual offense of which the defendant was convicted.

Moreover, the factfinding required in Tennessee and Maine goes far beyond the simple prior criminal history factfinding that *Apprendi* authorizes. *Apprendi*, 530 U.S. at 490. Consequently, the sentencing schemes of Maine and Tennessee strongly resemble the Oregon statute at issue here, and the sentencing regimes of all three states would be affected directly if the court below is affirmed.

c. Contrary to the arguments of the *amici* States, *Amici* States Br. at 4-6, affirming the Oregon Supreme Court's decision would not substantially limit a legislature's authority to enact sentencing reform in conformity with the Constitution, nor would it overturn traditional sentencing practices or require states to submit facts relevant to consecutive or concurrent sentencing to the jury. As this Court has made clear with respect to the federal Sentencing Guidelines, courts may consider legislatively-enumerated factors when determining appropriate criminal sentences without submitting the facts to the jury where the jury's verdict itself authorizes sentences up to the statutory maximum. *See, e.g., United States* v. *Booker*, 543 U.S. 220, 243-44, 258-67 (2005).

Just as the federal Sentencing Guidelines are advisory post-*Booker*, and federal judges are required to apply the Guidelines correctly but may issue any reasonable sentence within the prescribed range up to the statutory maximum, so too there would be little difficulty in allowing states to enumerate factors that courts must consider when determining whether to order multiple sentences to be served consecutively. Indeed, as the State *amici* themselves admit, Indiana already operates such a system. States *Amici* Br. at 7. *See also* Ind. Code Ann. §§ 35-50-1-2(c), 35-38-1-7.1(d).

Furthermore, a policy preference for greater predictability and uniformity of sentencing would not be impaired by affirming the Oregon Supreme Court. In fact, some states already restrict judicial discretion to issue consecutive or concurrent sentences in particular circumstances without mandating the sort of judicial fact-finding prohibited by *Apprendi*. For instance, Delaware requires that all multiple sentences be served consecutively, Del. Code Ann. § 901(d), while states such as Kentucky, North Dakota, and Vermont have placed restrictions on the maximum aggregate sentence that may be imposed if consecutive sentencing is ordered. *See* Ky. Rev. Stat. Ann. § 532.110 (limits on certain aggregate consecutive sentences); N.D. Cent. Code Ann. § 12.1-32-11 (establishing cap on aggregate consecutive sentences for misdemeanors); 13 Vt. Stat. Ann. § 7032 (establishing minimum and maximum terms for concurrent and consecutive sentencing). Consequently, the states would retain significant latitude to conduct sentencing reform in conformance with the Constitution if the decision below is affirmed.

Moreover, the traditional sentencing practice that most states continue to follow provides broad judicial

discretion to order consecutive or concurrent sentencing, except where specific sentencing is mandated for particular offenses. The existence of such judicial discretion indicates that every offense (except those for which the state legislature mandates concurrent sentencing) incorporates consecutive sentencing for multiple convictions as part of the statutory maximum sentence. Consequently, affirming the Oregon Supreme Court's decision would not undermine the traditional practice of allowing judges the discretion to determine whether multiple sentences should be served consecutively or concurrently.

d. In short, affirming the Oregon Supreme Court would directly affect only the three states (including Oregon) that have enacted sentencing schemes that radically depart from historical practice. The sentencing laws of the other forty-seven states would not be affected in a material way by affirming the decision below, and all of the states would retain sufficient and substantial latitude to enact meaningful sentencing reform within the bounds of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

THOMAS EUGENE ICE,

Respondent.

On Writ Of Certiorari To The Oregon Supreme Court

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QUESTION PRESENTED

Whether the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), requires that facts (other than prior convictions) necessary to imposing consecutive sentences be found by the jury or admitted by the defendant.

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INTEREST OF *AMICI*

Amici curiae Jonathan F. Mitchell, Stephanos Bibas, and Max M. Schanzenbach are law professors who research, write, and teach about this Court's sentencing jurisprudence. *Amici* have a professional interest in illuminating this Court's consideration of the doctrinal, historical, and policy issues involved in the proposed expansion of the holding of *Apprendi* v. *New Jersey*.[1]

Some of *amici*'s scholarly works on judicial fact-finding at sentencing have been cited and discussed by this Court. See *Blakely* v. *Washington*, 542 U.S. 296, 302 n.5, 311-312 (2004) (citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 Yale L.J. 1097 (2001)); *id.* at 331, 337 (Breyer, J., dissenting) (same); *Cunningham* v. *California*, 127 S. Ct. 856, 873 (2007) (Kennedy, J., dissenting) (citing Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St. J. Crim. L. 37 (2006)).

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

Thomas Eugene Ice managed an apartment complex where an 11-year-old girl lived with her family. On two different nights, Mr. Ice burglarized the family's apartment, entered the 11-year-old girl's bedroom, and sexually molested her by touching her breasts and then her vagina. A jury convicted Mr. Ice of two counts of first-degree burglary and four counts of first-degree sexual abuse: one count for touching the victim's breasts during the first burglary, another count for touching her vagina during that burglary, and two more counts for repeating those acts during the second burglary. J.A. 16-17.

Oregon law allows judges to impose consecutive sentences for criminal convictions "that do not arise from the same continuous and uninterrupted course of conduct." Or. Rev. Stat. § 137.123(2). But when two or more convictions "aris[e] out of a continuous and uninterrupted course of conduct," Oregon law requires concurrent sentences unless the court finds:

> (a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> (b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively

> different loss, injury or harm to the victim or caused or created a risk of causing loss, injury or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct.

Or. Rev. Stat. § 137.123(5).

The trial court found that Mr. Ice's two burglaries were "separate incidents" and imposed consecutive sentences of 80 months and 90 months for those burglaries pursuant to section 137.123(2). J.A. 39-40. This finding is incontestable, as the burglaries occurred days apart.

And although Mr. Ice's sexual-abuse convictions arose from the same "continuous and uninterrupted course of conduct" as his burglaries, the trial court found that they reflected a "willingness to commit more than one criminal offense" under Or. Rev. Stat. § 137.123(5)(a), and caused "greater or qualitatively different loss, injury or harm to the victim" under Or. Rev. Stat. § 137.123(5)(b). J.A. 39, 40-41. These conclusions are likewise unassailable. The trial court therefore ordered that Mr. Ice's sentences for sexual abuse run consecutively to his sentences for the burglaries. *Id.*

Finally, the trial court imposed concurrent sentences for the two incidents of sexual abuse that Mr. Ice committed during each burglary, and consecutive sentences for repeating those acts during the second burglary. J.A. 39-41. So Mr. Ice received consecutive

sentences of 80 and 90 months for touching the victim's vagina during the first and second burglaries. J.A. 39, 40. But the consecutive 75-month sentences that the court imposed for touching the victim's breasts during each of the burglaries ran concurrently to the sentences for touching the victim's vagina. J.A. 40, 41. Mr. Ice's cumulative punishment totaled 340 months of imprisonment, which included four consecutive sentences and two concurrent ones.

Mr. Ice appealed. The Oregon Court of Appeals affirmed without written opinion. But the Oregon Supreme Court reversed. It concluded that the Sixth Amendment, as construed in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Blakely* v. *Washington*, 542 U.S. 296 (2004), requires juries to make factual findings that are necessary to impose consecutive sentences under Or. Rev. Stat. § 137.123. The Oregon Supreme Court insisted that when a defendant is convicted of multiple offenses, *Apprendi* and *Blakely* extend the jury right to any fact that increases a defendant's total punishment "beyond the *aggregate* statutory maximum that the jury's verdict alone would support," even when such facts do not affect the individual sentence that a court imposes for each discrete criminal offense. *State* v. *Ice*, 170 P.3d 1049, 1059 (Or. 2007) (emphasis added). The Oregon Supreme Court never analyzed whether the trial court's failure to submit these questions to a jury was harmless error. It simply "reversed" the trial court's judgment based on this alleged *Apprendi* error and remanded the case "for resentencing." See *id.* at 1059.

This Court granted certiorari. *Oregon* v. *Ice*, 128 S. Ct. 1657 (2008).

SUMMARY OF ARGUMENT

This Court should reverse the Oregon Supreme Court's judgment for three reasons. First, the Oregon Supreme Court's analysis is inconsistent with the offense-specific approach to the Sixth Amendment that this Court established in *Apprendi*. This Court has consistently held that the Sixth Amendment jury right extends to certain facts that increase the "statutory maximum" punishment for a single crime. But this is an offense-specific inquiry. In cases with multiple convictions, *Apprendi* looks to each individual sentence imposed for a specific crime and asks whether it falls within the "statutory maximum" punishment authorized for that offense by the jury's factual findings or the defendant's guilty plea. *Apprendi* expressly rejects the Oregon Supreme Court's approach in this case, which defined the "statutory maximum" punishment as the highest cumulative penalty authorized by the jury's factual findings, and asked whether Mr. Ice's combined sentence exceeded that limit. Indeed, that understanding of "statutory maximum" would have compelled the *Apprendi* Court to affirm Charles Apprendi's sentence, because Mr. Apprendi's overall sentence never exceeded the cumulative penalty authorized for the three crimes that he admitted in his guilty plea.

Second, this Court has consistently rejected the proposition that the Sixth Amendment jury right applies to every factual finding that increases a defendant's maximum allowable punishment. It does not apply to recidivist sentencing enhancements, for example, even when they expose a defendant to a higher maximum penalty. Instead, the jury right applies only to facts that are "elements" or the "functional equivalent[s] of element[s]" of actual criminal "offenses." The case for treating consecutive-sentencing facts as the "functional equivalent[s] of element[s]" is even weaker than the oft-rejected argument that recidivist sentencing facts are "elements" of "offenses." There is no historical pedigree for treating consecutive-sentencing facts as jury facts or as components of substantive crimes, and most courts throughout American history regarded consecutive sentencing as an inherent judicial prerogative. That Oregon has chosen to make the decision between consecutive and concurrent sentences turn on determinative facts is more akin to establishing a mitigating sentencing consideration than to establishing an element of an aggravated criminal offense. Oregon was well within constitutional boundaries when it gave the trial judge exclusive power to make findings that simply aggregate sentences imposed for separate criminal "offenses."

Third, even if the trial court violated the Sixth Amendment by making factual determinations under Or. Rev. Stat. § 137.123, any such error was harmless beyond a reasonable doubt. *Apprendi* errors are

subject to harmless-error review, see, *e.g.*, *Washington* v. *Recuenco*, 548 U.S. 212 (2006), and the Oregon Supreme Court erred by automatically reversing the trial court's judgment and remanding for resentencing on the basis of this perceived *Apprendi* error.

Finally, if this Court decides to affirm the Oregon Supreme Court and extend the Sixth Amendment jury right to the factual findings specified in Or. Rev. Stat. § 137.123, it should not require the state of Oregon to prove such facts beyond a reasonable doubt. Many of this Court's decisions have assumed that the jury right and the proof-beyond-a-reasonable-doubt requirement are co-extensive, but this Court granted certiorari to consider only the Sixth Amendment issue. *Oregon* v. *Ice*, 128 S. Ct. 1657. We respectfully request that this Court avoid ruling on the burden-of-proof issue in this case.

ARGUMENT

I. The Oregon Supreme Court's decision is inconsistent with the offense-specific approach to the Sixth Amendment that this Court established in *Apprendi*.

The Sixth Amendment jury right extends to certain facts that expose a criminal defendant to a penalty beyond the "statutory maximum" punishment. See, *e.g.*, *Apprendi*, 530 U.S. 466. This Court has defined the "statutory maximum" punishment as the highest sentence a judge may impose without any

additional factual findings. See *Blakely*, 542 U.S. at 303-304. For defendants convicted of a single crime, the concept of "statutory maximum" is straightforward: No sentence may exceed the maximum penalty authorized by the facts that a jury finds or that a defendant admits. But when a defendant is convicted of multiple offenses, his "statutory maximum" could refer either to the highest *cumulative* penalty that a court may impose for all the convictions, or else to the maximum *individual* sentences that a court may impose for each specific offense.

Consider a defendant who is convicted of three crimes, each with a 5-year maximum, in a jurisdiction that allows courts to impose consecutive sentences without any additional factual findings. Under the "cumulative-penalty" view, the defendant's "statutory maximum" punishment is 15 years—the total punishment that the court may impose for those three crimes without any additional factual findings. And the Sixth Amendment would require a jury determination of any fact that increases a defendant's cumulative sentence beyond that 15-year maximum. The "offense-specific" view, by contrast, regards the "statutory maximum" as the highest sentence that a court may impose for each individual crime. On that view, the "statutory maximum" for each conviction is 5 years, and the jury right would attach to any fact that increases the sentence for one of those individual crimes beyond the 5-year maximum.

The Oregon Supreme Court adopted the cumulative-penalty understanding of "statutory maximum,"

and overturned Mr. Ice's sentence because the combined imprisonment for all six crimes exceeded the total punishment authorized by the jury's factual findings. See *State* v. *Ice*, 170 P.3d at 1058-1059. This was error. *Apprendi* embraces the offense-specific understanding of "statutory maximum," and explicitly rejects the idea that a defendant's "statutory maximum" punishment is the highest *cumulative* penalty authorized by the facts established in a jury's verdict or a defendant's guilty plea.

The defendant in *Apprendi* had pleaded guilty to three distinct crimes. Two of these were firearms offenses, each with a maximum penalty of 10 years' imprisonment; the other was a bomb-possession offense with a 5-year maximum. The trial court imposed a 12-year sentence for one firearms offense after finding that that Mr. Apprendi acted out of racial basis, and imposed shorter concurrent sentences for the other two crimes. Because New Jersey law gives judges discretion to impose consecutive or concurrent sentences in cases with multiple convictions,[2] the prosecutors argued that Mr. Apprendi's 12-year sentence fell within the "statutory maximum" punishment authorized by the facts established in his guilty plea. In their view, the "statutory maximum" was the 25 years of total imprisonment that the

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[2] See N.J. Stat. Ann. 2C:44-5(a) ("When multiple sentences of imprisonment are imposed on a defendant for more than one offense, . . . such multiple sentences shall run concurrently or consecutively as the court determines at the time of sentence.").

sentencing court could have imposed based on the facts that Mr. Apprendi admitted, and a 12-year sentence (with shorter concurrent penalties on other charges) fell within that range.

But this Court swiftly dispatched that contention, insisting that the constitutional question turns on whether the penalty imposed for *each discrete offense* exceeds the maximum punishment authorized for that offense. The relevant "statutory maxim[a]" were the offense-specific penalties authorized for each of Mr. Apprendi's three crimes, not the 25 years of cumulative punishment that the sentencing court could have imposed based on the facts in Mr. Apprendi's guilty plea:

> Apprendi's actual sentence was thus within the range authorized by statute for the three offenses to which he pleaded guilty. *The constitutional question, however, is whether the 12-year sentence imposed on count 18 was permissible*, given that it was above the 10-year maximum for the offense charged in that count. . . . *The sentences on counts 3 and 22 have no more relevance to our disposition than the dismissal of the remaining 18 counts.*

Apprendi, 530 U.S. at 474 (emphasis added) (citation omitted).

This holding forecloses the Oregon Supreme Court's claim that Mr. Ice's sentence exceeded the "statutory maximum" simply because his cumulative penalty exceeded the total punishment authorized by

the jury's verdict. That understanding of "statutory maximum" would have compelled this Court to *affirm* Mr. Apprendi's sentence, because his 12-year penalty (with shorter concurrent sentences on the other charges) never exceeded the 25 years of total punishment authorized by the facts that he admitted. But *Apprendi* rejects this approach and adopts the offense-specific view of "statutory maximum," where the jury right depends on the penalty imposed for each distinct criminal offense, without regard to how a sentencing court might aggregate such penalties.

The Oregon Supreme Court never acknowledged or discussed this holding from *Apprendi*, even though it figures prominently in the many court opinions that reject *Apprendi*'s application to consecutive-sentencing determinations.[3] Instead, the Oregon Supreme Court held that the jury right attaches to factual findings that increase punishment "beyond the *aggregate* statutory maximum that the jury's verdict alone would support." See *State* v. *Ice*, 170 P.3d at 1059 (emphasis added). It based this revisionist view on the "principles underpinning *Apprendi*" rather than the actual holding in that case. See *id.* at

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[3] See, *e.g.*, *United States* v. *Chorin*, 322 F.3d 274, 279 (3d Cir. 2003); *United States* v. *McWaine*, 290 F.3d 269, 275-276 (5th Cir. 2002); *United States* v. *White*, 240 F.3d 127, 135 (2d Cir. 2001); *People* v. *Wagener*, 752 N.E.2d 430, 441 (Ill. 2001); *State* v. *Senske*, 692 N.W.2d 743, 747 (Minn. Ct. App. 2005); *State* v. *Keene*, 927 A.2d 398, 405-408 (Me. 2007); *State* v. *Bramlett*, 41 P.3d 796, 797-798 (Kan. 2002); *State* v. *Cubias*, 120 P.3d 929, 931 (Wash. 2005).

1058; see also *id.* at 1059 ("The *Apprendi*, *Blakely*, and *Booker* decisions all go to great lengths to discuss the broad principles underpinning their particular holdings. It would be wrong for us to engage in an adamantine refusal to get the message."). But the Oregon Supreme Court must follow this Court's holdings, rather than speculations about the "broad principles" that might "underpin[]" those holdings. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002) (refusing to overrule *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), notwithstanding the dissenting opinion's contention that *McMillan* was inconsistent with "the very principles that animated *Apprendi*," *id.* at 572 (Thomas, J., dissenting)). And the Oregon Supreme Court's understanding of "statutory maximum" would overrule the outcome that this Court reached in *Apprendi*, because Mr. Apprendi's sentence never exceeded the "aggregate statutory maximum" authorized by the facts that he admitted.[4]

If this Court chooses to affirm the Oregon Supreme Court's judgment while preserving the outcome in *Apprendi*, then the meaning of "statutory maximum" will fluctuate from case to case. In cases like *Apprendi*, the "statutory maximum" will be the

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[4] The Oregon Supreme Court is not alone in adopting an understanding of "statutory maximum" that is flatly inconsistent with *Apprendi*. See, *e.g.*, *United States* v. *Campbell*, 279 F.3d 392, 401 (6th Cir. 2002) ("Thus, the prescribed statutory maximum for *Apprendi* purposes would be the sum of the statutory maximums for each of the counts upon which the defendant was convicted.").

offense-specific maximum punishment for individual crimes. See *Apprendi*, 530 U.S. at 474. And the prosecutor will be unable to argue that the "statutory maximum" should be the maximum aggregate penalty authorized by the jury's factual findings (or the defendant's guilty plea). See *id.* The same result would obtain in other cases where the penalty imposed for a discrete crime exceeds the offense-specific statutory maximum, but the cumulative sentence stays within the aggregate punishment authorized by a jury's factual findings. But in cases such as this one, the courts will instead define the "statutory maximum" as the maximum aggregate penalty allowed by the facts that a jury finds (or that the defendant admits). And the prosecutor will be unable to persuade a court that the relevant "statutory maxim[a]" are the offense-specific maximum penalties authorized for each crime based on the jury's factual findings. The Oregon Supreme Court never offered a rationale that could justify such an asymmetric regime, nor is any rationale apparent, other than a bald preference to stack the deck in favor of criminal defendants. The sounder approach, urged by the petitioners in this case, is to establish a consistent definition of "statutory maximum" as the highest penalty that a Court may impose for a discrete criminal offense, without regard to how a sentencing court might aggregate that penalty with others. See, *e.g.*, *id.* at 490 ("Other than the fact of a prior conviction, any fact that increases the *penalty for a crime* beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.")

(emphasis added). That understanding of the jury right will preserve the outcome that this Court reached in *Apprendi* while avoiding the unprincipled asymmetries that the Oregon Supreme Court's approach would produce.

Of course, there are statements in *Apprendi* that, wrenched from their context, might seem to support the Oregon Supreme Court's decision to equate "statutory maximum" with the highest cumulative penalty allowed by a jury's factual findings, rather than the offense-specific maximum punishment authorized for each crime. For example, this Court wrote that "the relevant inquiry is not one of form, but of effect—does the required finding *expose the defendant to a greater punishment* than that authorized by the jury's verdict?" *Id.* at 494 (emphasis added). See also *id.* at 490 ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties to which a criminal defendant is exposed.*") (emphasis added). But none of these passages can possibly refer to the *cumulative* punishment authorized by a jury's factual findings, because Mr. Apprendi's sentence never exceeded the total punishment authorized by the facts in his guilty plea. See *id.* at 474. Nor can *Blakely* v. *Washington*'s definition of "statutory maximum" aid the Oregon Supreme Court in this case. See *Blakely*, 542 U.S. at 303-304 ("[T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any

additional findings."). If this passage from *Blakely* equates the "relevant 'statutory maximum'" with the maximum *aggregate* sentence that a judge may impose based on facts found by a jury or admitted by the defendant, then *Blakely* overruled *Apprendi sub silentio*. That is an utterly implausible proposition, given that *Apprendi*'s holding provided the foundation for the *Blakely* Court's analysis. See *id.* at 301 ("This case requires us to apply the rule we expressed in *Apprendi* v. *New Jersey* . . . "); *id.* at 305 ("Our commitment to *Apprendi* in this context reflects . . . respect for longstanding precedent . . . ").[5]

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[5] Statements in other post-*Apprendi* opinions likewise cannot establish that the Sixth Amendment jury right depends on whether a fact increases a defendant's maximum *cumulative* sentence without overruling the outcome that this Court reached in *Apprendi*. See, *e.g.*, *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002) ("If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt."); *United States* v. *Booker*, 543 U.S. 220, 244 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

II. The facts in Or. Rev. Stat. § 137.123 cannot reasonably be characterized as "elements" or "functional equivalent[s] of element[s]" of criminal offenses.

This Court has consistently rejected the notion that the jury right and the reasonable-doubt rule should attach to any factual finding that increases the maximum sentence that a judge can impose. Instead, this Court has extended these constitutional protections to facts that are "elements" or the "functional equivalent[s] of element[s]" of actual criminal offenses. See, *e.g.*, *United States* v. *Booker*, 543 U.S. 220, 230 (2005) ("[T]he 'Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged.'") (quoting *United States* v. *Gaudin*, 515 U.S. 506, 511 (1995)). This has led the Court to exclude facts about prior convictions from *Apprendi*'s domain, even when they increase a defendant's maximum allowable punishment. See, *e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 239-247 (1998); *James* v. *United States*, 127 S. Ct. 1586, 1600 n.8 (2007). It should similarly lead this Court to exclude the factual determinations in Or. Rev. Stat. § 137.123, which simply tell courts how to aggregate a defendant's distinct punishments for distinct criminal offenses.

A. Although Joel Prentiss Bishop's treatises say that "every fact which is legally essential to the punishment" should be treated as an ingredient of a substantive crime, this claim has no historical support and the Court has rightly rejected it.

Some nineteenth-century treatise writers urged a theory of "elements" that is broader than the approach in this Court's *Apprendi* jurisprudence. For example, Joel Prentiss Bishop's treatises assert that "every fact which is legally essential to the punishment" must be charged in indictments and treated as an ingredient of substantive criminal offenses. See, *e.g.*, Joel Prentiss Bishop, 1 *Criminal Procedure* § 81 at 51 (Little, Brown, 2d ed. 1872) (stating that nineteenth-century indictments were required to include "every fact which is legally essential to the punishment"); *id.*, § 540 at 330 ("[T]he indictment must . . . contain an averment of every particular thing that enters into the punishment."). This concept of "elements" extends beyond the jury facts that this Court established in *Apprendi* and reaches facts about prior convictions as well as facts that increase a defendant's minimum punishment. See, *e.g.*, Joel Prentiss Bishop, 1 *Criminal Law* §§ 961-963 at 564-565 (Little, Brown, 5th ed. 1872) (arguing that recidivist sentencing enhancements should be alleged in indictments and submitted to juries).

But these statements in Bishop's treatises are demonstrably untrue.[6] Nineteenth-century courts almost uniformly rejected Bishop's views of the indictment, as well as the proposition that any fact that increases a defendant's punishment must be an "element" of a crime. For example, nineteenth-century courts consistently held that murder indictments need not charge the degree of murder, even though a first-degree murder finding increased the defendant's punishment from life imprisonment to death.[7] They also held that first- and second-degree murder were simply sentencing categories within the unitary crime of "murder," rather than "elements" of a substantive criminal offense.[8] All these court

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[6] The discussion in this section borrows from Jonathan F. Mitchell, Apprendi's *Domain*, 2006 Sup. Ct. Rev. 297, 329-342.

[7] See also *Noles* v. *State*, 24 Ala. 672, 693 (1854); *McAdams* v. *State*, 25 Ark. 405, 416 (1869); *People* v. *Murray*, 10 Cal. 309, 310 (1858); *Garvey* v. *People*, 6 Colo. 559, 563 (1883); *State* v. *Ellington*, 43 P. 60, 61 (Idaho 1895); *State* v. *Verrill*, 54 Me. 408, 415-416 (1867); *Ford* v. *State*, 12 Md. 514, 529-530 (1859); *Green* v. *Commonwealth*, 94 Mass. 155, 170-171 (1866); *People* v. *Doe*, 1 Mich. 451, 457-458 (1850); *State* v. *Lessing*, 16 Minn. 75, 78 (1870); *Territory* v. *Stears*, 2 Mont. 324, 327-328 (1875); *State* v. *Millain*, 3 Nev. 409, 442 (1867); *State* v. *Williams*, 23 N.H. 321, 324 (1851); *Cox* v. *People*, 80 N.Y. 500, 514 (1880); *Mitchell* v. *State*, 16 Tenn. 514, 527 (1835); *id.* at 530-534 (Catron, C.J., concurring); *Hines* v. *State*, 27 Tenn. 597, 598 (1848); *Gehrke* v. *State*, 13 Tex. 568, 573-574 (1855); *Commonwealth* v. *Miller*, 3 Va. 310, 311 (1812); *State* v. *Schnelle*, 24 W. Va. 767, 779 (1884); *Hogan* v. *State*, 30 Wis. 428, 439-442 (1872).

[8] See, *e.g.*, *White* v. *Commonwealth*, 6 Binn. 179, 183 (Pa. 1813) (opinion of Tilghman, J.) ("All that [the statute] does, is to define the different kinds of murder, which shall be ranked in

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decisions refute the aspirations in Bishop's treatise, such as his statement that according to "those principles of natural reason and justice which are inherent in the case, . . . the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offence to be in this degree." See Bishop, 2 *Criminal Procedure* § 586 at 308.

Indeed, some nineteenth-century state-court decisions explicitly rejected Bishop's claim that indictments "must contain an allegation of every fact which is legally essential to the punishment to be inflicted." See, *e.g.*, *State* v. *Millain*, 3 Nev. 409, 439,

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different classes, and be subject to different punishments. It has not been the practice since the passing of this law, to alter the form of indictments for murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made."); *id.* at 188 (Yeates, J., concurring in part and dissenting in part) (agreeing that the first-degree murder statute "creates no new offense as to willful and deliberate murder. . . . Different degrees of guilt exist under the general crime of murder."); *Titus* v. *State*, 7 A. 621, 623 (N.J. 1886) (stating that New Jersey's first-degree murder statute "did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' . . . [I]t [is] not necessary to set out in the count that the alleged killing was 'willful, deliberate, and premeditated,' [and] it cannot be necessary to show that the killing was in the commission of a rape, which is another of the categories of the same section.") (quoting *Graves* v. *State*, 45 N.J.L. 347, 358 (N.J. 1883)).

442 (1867) (noting that "Mr. Bishop has labored with zeal and ingenuity to show the distinct nature of the two offenses," but concluding that "it was not the intention of the legislature, in making the distinction in the two classes of murder, to require a distinct indictment for each."). There is simply no historical evidence that can support a constitutional rule requiring every fact that increases a defendant's maximum allowable punishment to be treated as if it were an "element" of a substantive crime. And this Court has rightly rejected that view, opting for a more contextual approach that excludes recidivist sentencing facts from *Apprendi*'s domain along with other factual determinations that cannot reasonably be characterized as "elements" of substantive "crimes." See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545 (2002).

B. There is no historical pedigree for treating consecutive-sentencing facts as jury facts or as "elements" of substantive crimes.

In *Almendarez-Torres*, this Court held that facts about prior convictions are not "elements" of substantive crimes, even when they increase a defendant's maximum allowable punishment. Yet *Almendarez-Torres* acknowledged a "tradition" of court decisions that had treated facts about prior convictions as "elements" of a substantive offense. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 246

(1998).[9] This tradition was insufficient to justify a constitutional requirement that recidivist sentencing enhancements be treated as "elements," because the tradition was "not uniform" and did not appear to rest on a federal constitutional guarantee. *Id.* at 246-247.

With consecutive-sentencing facts, by contrast, there is no historical pedigree whatever for treating them as "functional equivalents of elements" of substantive crimes, even when they expose a defendant to a higher aggregate sentence. Sentencing regimes that authorized consecutive prison terms arose in the nineteenth century after state courts divided as to whether they had an inherent prerogative to impose

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[9] During the nineteenth and twentieth centuries, state and federal courts repeatedly held that recidivist sentencing enhancements were essential elements of substantive crimes that must be proved to a jury. See, *e.g.*, *People* v. *Reese*, 179 N.E. 305, 307-308 (N.Y. 1932); *State* v. *O'Neill*, 248 P. 215, 217-219 (Mont. 1926); *Green Bay Fish Co.* v. *State*, 202 N.W. 667, 670 (Wis. 1925); *State* v. *Smith*, 106 N.W. 187, 189 (Iowa 1906); *State* v. *Bailey*, 115 So. 613, 616-618 (La. 1928); *State* v. *Compagno*, 51 So. 681, 682 (La. 1910); *Hall* v. *State*, 89 A. 111, 112-113 (Md. 1913); *Osborne* v. *State*, 211 N.W. 179, 180 (Neb. 1926); *State* v. *McGee*, 221 N.W. 556, 558 (Iowa 1928); *State* v. *Schneider*, 29 S.W.2d 698, 700 (Mo. 1930); *Johnston* v. *State*, 287 P. 1068, 1069 (Okla. Cr. 1930); *Tipton* v. *State*, 28 S.W.2d 635, 639 (Tenn. 1930); *State* v. *Beaudoin*, 158 A. 863, 864 (Me. 1932); *State* v. *Furth*, 104 P.2d 925 (Wash. 1940); *Garvey* v. *Commonwealth*, 74 Mass. 382, 383 (1857); *Tuttle* v. *Commonwealth*, 68 Mass. 505, 506 (1854); *Rauch* v. *Commonwealth*, 78 Pa. 490 (1876); *Smith* v. *Commonwealth*, 14 Serg. & Rawle 69 (Pa. 1826); *Long* v. *State*, 36 Tex. 6, 10 (1872). See also *Massey* v. *United States*, 281 F. 293, 297-298 (8th Cir. 1922); *Singer* v. *United States*, 278 F. 415, 420 (3d Cir. 1922).

such sentences. Some jurisdictions allowed their courts to impose a sentence that commenced after the expiration of a previous sentence.[10] Others held that prison sentences could not commence at a future time absent explicit statutory authority.[11] But a few jurisdictions established regimes that allowed for consecutive sentencing only when certain factual predicates existed. And none of these factual predicates was ever treated as an "element" of a substantive crime or as a jury question.

In Missouri, for example, a court could not order consecutive sentences unless two factual predicates existed: (1) The defendant must have been awaiting sentence on each of the multiple convictions; and (2) The convictions must have occurred during the same term of court. See, *e.g.*, *Ex parte Meyers*, 44 Mo. 279, 282 (1869) ("There is no provision anywhere made . . . where separate sentences can be passed upon a prisoner, and he be subjected to more than one term

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[10] See, *e.g.*, *Commonwealth* v. *Leath*, 3 Va. 151 (1806); *State* v. *Smith*, 5 Day 175 (Conn. 1811); *Russel* v. *Commonwealth*, 7 Serg. & Rawle 489 (1822); *Kite* v. *Commonwealth*, 52 Mass. 581 (1846); *People* v. *Forbes*, 22 Cal. 135 (1863); *United States* v. *Blaisdell*, 3 Ben. 132 (S.D.N.Y. 1869); *Petition of McCormick*, 24 Wis. 492 (1869); *Mims* v. *State*, 5 N.W. 374 (Minn. 1880); *State* v. *Carlyle*, 33 Kan. 716 (1885); *State* v. *Robinson*, 5 So. 20 (La. 1888); *In re Packer*, 33 P. 578 (Colo. 1893); *In re Walsh*, 55 N.W. 1075 (Neb. 1893); *In re Greenwald*, 77 F. 590 (N.D. Cal. 1896); *Wallace* v. *State*, 26 So. 713, 725 (Fla. 1899).

[11] See, *e.g.*, *Miller* v. *Allen*, 11 Ind. 389 (1858); *Lamphere's Case*, 27 N.W. 882 (Mich. 1886); *Ex parte Meyers*, 44 Mo. 279 (1869); *Prince* v. *State*, 44 Tex. 480 (1876).

of punishment, unless the different convictions were had at the same term, and both were obtained previous to the sentence."). But the Missouri courts never held or intimated that *juries* should make the crucial findings that a defendant is awaiting sentence for multiple convictions that occurred during the same term of court, even though these factual predicates exposed a defendant to a longer cumulative punishment.

Consider *Ex parte Turner*, 45 Mo. 331 (1870), where the petitioner had been convicted and sentenced for two different crimes during the same term of court. The trial court imposed a three-year sentence for one conviction and a two-year sentence for the other. On petition for writ of *habeas corpus*, the petitioner alleged that the sentences must run concurrently because the trial court never specified the commencement date for the petitioner's second term of imprisonment. The Missouri Supreme Court brushed aside the contention, holding that the sentences must be served consecutively. It rejected the need for *any* formal determination, by judge or jury, as to whether the multiple sentences would be served consecutively or concurrently, even though the question turned on determinate facts. The Court instead treated the issue as a pure question of law: "[W]hen he is convicted and sentenced for two offenses, *the law also expressly decides when* the second term shall begin, *and it is wholly unnecessary for the court to decide it*." See *Turner*, 45 Mo. at 322 (emphasis added).

And in *Meyers*, the defendant had been convicted and sentenced for two different counts of larceny. The first conviction occurred during the trial court's March 1866 term, and the court imposed a sentence of two years' imprisonment. The second conviction was during that court's May 1866 term, and the court imposed an additional three-year sentence. On petition for writ of *habeas corpus*, the Missouri Supreme Court held that the sentences must run concurrently because they had been imposed during different terms of the trial court. But nowhere did the Court's opinion fault the trial court for failing to submit this question to a jury, nor did the Court suggest that this factual determination was an "element" of a substantive crime that prosecutors must charge in indictments. The state supreme court simply decided the factual issue for itself.

Texas established a regime similar to Missouri's, allowing courts to impose consecutive sentences on defendants convicted of multiple offenses at the same term of court. See *Shumaker* v. *State*, 10 Tex. App. 117 (1881).[12] But there was no requirement that juries

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[12] *Shumaker* quoted a Texas statute providing that "where the same defendant has been convicted in two or more cases at the same term of the court, and the punishment assessed in each case is confinement in the penitentiary for a term of years, judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction has

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find that the defendant's multiple convictions had occurred during the same term of court; to the contrary, the court in *Shumaker* held that "it was competent and proper *for the judge* to direct" that a fifteen-year sentence for stealing a horse commence after the expiration of a sentence imposed in another case during the same term of court. *Id.* at 118 (emphasis added).

These cases show that judges have traditionally made the factual determinations necessary to authorize consecutive sentencing. To our knowledge, there is no authority holding that such facts needed to be alleged in indictments, submitted to juries, or proved beyond a reasonable doubt. Unlike facts about prior convictions, consecutive-sentencing facts appear never to have been treated as "elements" of substantive crimes. So if this Court's jurisprudence continues to exclude facts about prior convictions from the "functional equivalent[s] of element[s]," it is hard to see how it can justify extending the *Apprendi* rule to consecutive-sentencing facts. Indeed, most courts regarded the right to impose consecutive sentences as an inherent prerogative, regardless of whether the judge's ultimate decision turned on disputed factual issues.[13] That Oregon has chosen to make the decision between consecutive and concurrent sentences turn on determinative facts is more akin to establishing a

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ceased to operate, and the sentence and execution thereof shall be accordingly." 10 Tex. App. at 117.

[13] See cases cited in note 10, *supra*.

mitigating sentencing consideration than to establishing an element of an aggravated criminal offense.

III. If the trial court committed *Apprendi* error, it was harmless beyond a reasonable doubt.

Apprendi errors are subject to harmless-error review. See *Washington* v. *Recuenco*, 548 U.S. 212 (2006). Yet the Oregon Supreme Court's opinion failed to apply harmless-error analysis when it reversed the trial court's judgment and remanded "for resentencing." This was error.

If ever there was a case of harmless judicial factual findings, it is this case. The trial court's findings in this case were observable and objective facts. Its conclusion that Mr. Ice's two burglaries were "separate incidents" under Or. Rev. Stat. § 137.123(2) was compelled by the fact that they occurred days apart. And its finding that Mr. Ice sexual-abuse convictions caused "greater or qualitatively different loss, injury or harm to the victim" under Or. Rev. Stat. § 137.123(5)(b) is similarly impossible to doubt. Far from judicial factual findings that probe a defendant's subjective mental state, such as the "deliberate cruelty" enhancement in *Blakely* or the racial-bias issue in *Apprendi*, the trial court's findings in this case are patently obvious and unassailable. Only a jury bent on nullification could conclude otherwise. And if the prospect of jury nullification can defeat a claim of harmless error, then *Recuenco* is a dead letter.

The Oregon Supreme Court's opinion never applied harmless-error analysis. Nor did its remand to the trial court leave any room for harmless-error analysis; it remanded the case "for resentencing," implicitly endorsing the structural-error regime that this Court rejected in *Recuenco*. Even if this Court concludes that the trial court violated the Sixth Amendment by making factual determinations under Or. Rev. Stat. § 137.123, it should still reverse the Oregon Supreme Court for spurning this Court's decision in *Recuenco*. It is clear beyond a reasonable doubt that a jury would have reached the same factual conclusions as the trial court in this case.

IV. If this Court decides to extend the Sixth Amendment jury right to the facts in Or. Rev. Stat. § 137.123, it should not extend the reasonable-doubt rule to these factual findings.

If this Court disagrees with our analysis, and concludes that the Sixth Amendment requires a jury to make the findings specified in Or. Rev. Stat. § 137.123, it does not follow that the reasonable-doubt rule must also attach to such facts. Many of this Court's decisions have assumed that the jury right and the reasonable-doubt rule are co-extensive. See, *e.g.*, *Cabana* v. *Bullock*, 474 U.S. 376 (1986); *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986); see also *Monge* v. *California*, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting). But this Court granted certiorari to consider only the Sixth Amendment issue. See

Oregon v. *Ice*, 128 S. Ct. 1657 (2008). Whether this Court should maintain its linkage between the jury right and the reasonable-doubt rule is an issue for another day.

CONCLUSION

This Court should reverse the Oregon Supreme Court's judgment.

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